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No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE, *et al.*,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

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QUESTION PRESENTED

In *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), this Court invalidated Washington's business and occupation tax for discrimination against interstate commerce in violation of the Commerce Clause. The question presented is whether the State's rephrasing of its statute is an evasion of *Tyler Pipe* and a continuation of the discrimination in violation of the Commerce Clause where:

(i) The local exemption in the statute invalidated by *Tyler Pipe* has been replaced with a credit that operates as an automatic exemption for wholly local businesses but is, on its face *and* as applied, essentially unavailable to businesses selling across state lines; and

(ii) The device employed to render the credit ineffective is like that prohibited by the Court's unanimous decision in *New Energy v. Limbach*, 486 U.S. 269 (1988), in that other states are required to conform the labels and calculations of their taxes precisely to Washington's as a condition to their citizens receiving parity of tax treatment with Washington's local businesses.

PARTIES TO THE PROCEEDING

Appellants before the Washington Supreme Court and Petitioners before this Court are 77 business enterprises listed at Appendix 54a-99a, together with their parents and subsidiaries as required by Rule 29.1.

Appellee before the Washington Supreme Court and Respondent before this Court is the State of Washington, through its administrative agency, the Department of Revenue.

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OPINIONS BELOW

The opinion of the Washington Supreme Court, reproduced at App. 1a-17a, is reported at 114 Wash. 2d 236, 787 P.2d 545 (1990).

The unpublished judgment of the Superior Court for Thurston County, Washington, is reproduced in pertinent part at App. 18a-19a.

JURISDICTION

The final decision of the Washington Supreme Court was rendered March 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reproduced at App. 47a-50a are the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3) and the pertinent portions of the Revised Code of Washington §§ 82.04.220, .230, .240, .250, .270, .440, .500 (1989).

STATEMENT OF THE CASE

Petitioners' Businesses

Petitioners are 77 businesses that produce products (by extracting and/or manufacturing) that are sold across state lines. These businesses generally fall into three categories:

1. Some (approximately 47) produce products outside the State and sell them in Washington.

2. Some (approximately 16) produce products in Washington and sell them elsewhere.

3. The remaining Petitioners engage in both of these forms of interstate commerce. They produce products in Washington that they sell elsewhere and also produce products elsewhere that they sell in Washington.

App. 37a-46a.

History of the Challenged Tax

The taxes challenged here were imposed under the latest version of Washington's business and occupation tax ("B&O tax") statute. This Court invalidated the prior version in 1987. *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). The taxes were held to discriminate, in violation of the Commerce Clause, against manufacturers selling across state lines.

For many years, Washington has imposed a variety of B&O taxes, including an extracting tax, a manufacturing tax, and selling (wholesale or retail) taxes. A business was subject to both the tax on production (extracting or

manufacturing)[1] and a selling tax as the business first produced and then sold its products. *Local* businesses have always been excused entirely and automatically from paying one or the other of these two taxes. Interstate businesses have not. As each successive version of the tax has been invalidated by the courts for discrimination against interstate commerce, the disparity of treatment between local and interstate business has been preserved by altering the statute's phrascology.

Prior to 1950, the obligation to pay both a manufacturing and selling tax was excused by an exemption which the State awarded to wholly local businesses. Local businesses, by paying the manufacturing tax, automatically earned an exemption from the selling tax. Businesses that did not pay the manufacturing tax because they manufactured out-of-state could not earn the exemption. They therefore paid a selling tax that local businesses did not pay. The State's own Supreme Court held this exemption in violation of the Commerce Clause in *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948).

As this Court observed in *Tyler Pipe*: "Two years later, in 1950, the Washington legislature responded to this ruling [*Columbia Steel*] by turning the B & O tax exemption scheme inside out." 483 U.S. at 236. The exemption was switched from selling to manufacturing. Thereafter wholly local businesses paid the same selling tax that out-of-state manufacturers paid. The difference in treatment was preserved, however: by paying the *selling* tax, wholly local businesses were given an exemption from the Washington *manufacturing* tax. Out-of-state manufacturers could not use that exemption and so did not receive a tax benefit like that given local businesses. Likewise, Washington manufacturers who sold their products outside the State were required to pay the manufacturing tax that wholly local businesses did not pay.

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[1] What is said in this petition abo .t the application of the Washington tax to "manufacturing" activities is generally true of "extracting" activities as well.

At first, the Washington legislature's "inside out" drafting succeeded. The tax narrowly survived a challenge, brought by an out-of-state manufacturer, in a 5-4 decision of this Court. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). The majority did not reach the discrimination issue because the taxpayer had failed to demonstrate what tax burdens other states had placed on shipments that Washington was taxing. Dissenters recognized the new inside-out tax as the practical equivalent of the tax that the Washington Supreme Court had invalidated in *Columbia Steel*. *Id.* at 459-60 (Goldberg, J., with Stewart and White, JJ., dissenting); *see also id.* at 449-51 (Brennan, J., dissenting).

Twenty years later, this Court struck down a West Virginia tax structured much like that invalidated in *Columbia Steel*. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). The Court reasoned in *Armco* that the West Virginia tax was facially discriminatory because out-of-state manufacturers paid a selling tax from which wholly local businesses were exempt by reason of paying the manufacturing tax. In so ruling, the Court explicitly adopted the reasoning of Justice Goldberg's dissent in *General Motors*. *Id.* at 642.

Washington's B&O tax again came before this Court in *Tyler Pipe*. Following the *Armco* reasoning and specifically overruling the majority reasoning in *General Motors*, the Court held the B&O tax facially discriminatory. This time, the Court penetrated the facade of the "inside out" maneuver. The Court perceived what the *General Motors* dissent had seen earlier—the Washington tax had the same economic effect as the predecessor tax struck down in *Columbia Steel*.[2] Washington manufac-

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[2] *Armco* and *Tyler Pipe* were decided after the landmark case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), had changed Commerce Clause law from an emphasis on formalisms to a concern for economic substance.

turers selling into other states paid a manufacturing tax that businesses selling locally did not pay. Similarly, Washington manufacturers that sold locally and paid the selling tax received an exemption from the manufacturing tax that out-of-state manufacturers, paying the same selling tax, could not obtain. Concluding that the Washington statute discriminated against interstate commerce "as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco*," the Court explained: "The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." 483 U.S. at 248.

In dicta, the Court suggested that its holding might not necessarily preclude the continued assessment of the selling tax, because "[e]ither a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination." *Id.* at 249.

Legislature's Rejection of Curative Legislation

To eliminate the discrimination of its statute, Washington was required by *Tyler Pipe* to equalize economic tax burdens between local business and interstate commerce. As one alternative, the legislature considered equalizing those burdens by taxing local business more. It declined to do so, recognizing that while eliminating the exemption enjoyed only by wholly local business would increase state revenues by $60 million for the 1987-89 biennium, local business would "on the whole . . . pay more tax and out-of-state manufacturers less tax" than under the old system. App. 23a-24a (message to Members, Washington State Legislature, from House and Senate Majority and Minority Leaders). Having rejected the equalizing of burdens by taxing local business more, the legislature considered the opposite alternative. It looked

into equalizing burdens by taxing interstate business less, through apportionment. Although acknowledging that three-factor apportionment is the "standard practice" in other states, the legislature rejected such apportionment because "this option could mean a loss of as much as $200 million in the 1987-89 biennium." App. 24a-25a.

Operation of the Challenged Tax

The Washington legislature thereupon devised a 1987 redraft of its statute that produces minimal local economic impact—perpetuating the disparity in tax burdens between local and interstate commerce that this Court condemned in *Tyler Pipe*.

The latest exemption scheme reverts to its pre-*Columbia Steel* format except that the exemption is relabeled a "credit" and purports to be available to interstate commerce for taxes paid to certain other jurisdictions.[3]

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[3] *See* Wash. Rev. Code § 82.04.440, set forth in pertinent part below and in full at App. 48a-50a. While the language of the statute is highly technical, its design is as restrictive as the application that the State has given it:

> Persons taxable on multiple activities—Credits.
>
> (1) Every person engaged in activities within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290 [including manufacturing, extracting, wholesaling, and retailing] shall be taxable under *each* paragraph applicable to the activities engaged in.
>
> (2) Persons taxable under RCW 82.04.250 [retailing] or 82.04.270 [wholesaling] shall be allowed a credit against those taxes for any (a) *manufacturing* taxes paid with respect to the manufacturing of products so sold in this state. . . .
>
> . . . .
>
> (4) Persons taxable . . . with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) *gross receipts taxes* paid to another state *with respect to the sales* of the products so extracted or manufactured in this state. . . .
>
> (5) For the purpose of this section:
>
> (a) "Gross receipts tax" means a tax:

Local businesses continue to pay only *one* tax. By paying the manufacturing tax, they are effectively exempted from the selling tax through an automatic credit (herein the "local credit").[4] By contrast with this automatic credit for local businesses, the credit ostensibly provided for *interstate* manufacturers (the "interstate credit") not only is not automatic but, more importantly, is so narrowly applied as to be inapplicable to most interstate business.

At least 94% of all the general state business taxes imposed by the other 49 states are *not* eligible for the interstate credit ostensibly available against Washington's B&O tax. App. 27a-29a.

Interstate businesses (including these Petitioners) receive credits of less than ½ of 1% of their aggregate tax liability for manufacturing and selling. The automatic local credit, in contrast, relieves local businesses of

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(i) Which is imposed on or *measured by the gross volume of business,* in terms of gross receipts or in other terms, *and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax;* and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

. . . .

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the [Washington manufacturing B&O tax] . . . and (ii) similar gross receipts taxes paid to other states.

. . . .

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given . . . [under Washington law] *notwithstanding the use of those terms in the context of describing taxes imposed by other states.*

(Emphasis added).

[4] The exemption for local business is labeled a "credit," but, in reality, the manufacturing tax on which the credit is based always equals or exceeds the selling taxes, so the "credit" is as automatic as an exemption. Wash. Rev. Code §§ 82.04.230, .240, .250, .270. App. 47a-48a.

50% of their aggregate tax liability for manufacturing and selling. Thus the credit given local business is *100 times* greater than the average credit allowed interstate business. App. 22a, 34a.

These results obtain from the design of the statute. The statute provides that every interstate business engaged in extracting, manufacturing, and selling is subject to Washington tax on *each* of those activities conducted even partly within the State. *See* Wash. Rev. Code § 82.04.440(1). App. 48a. The interstate credit provision requires such a business to prove that it has paid a tax that conforms strictly to the form of Washington's tax. In tax parlance, the nominal "incident" of the tax must conform to Washington's. For example, the interstate credit against the Washington tax on selling requires that another jurisdiction's tax must be imposed on the privilege of engaging in business as a "manufacturer" or "extractor." *Id.* § 82.04.440(2), (5)(c), (5)(d). App. 48a, 50a. Conversely, to be eligible for credit against the Washington taxes on manufacturing and extracting, another jurisdiction's tax based on revenues generated from selling activities must be imposed on the privilege of selling. The Washington statute requires that the tax be one "paid . . . with respect to . . . sales." *Id.* § 82.04.440(4)(i). App. 49a. Under Washington's system, therefore, it is not enough that the taxes are paid to another jurisdiction with respect to the same activities that are taxable in Washington; the label by which the other jurisdiction describes the subject of its tax must conform to Washington's dictates. *Id.* § 82.04.440(5)(e). App. 50a ("[T]erms used in this section have the meanings given . . . [under Washington law] notwithstanding the use of those terms in the context of describing taxes imposed by other states.").

Moreover, it is also not enough to qualify for the interstate credit that the same revenues that go into another jurisdiction's tax base are also included in Washington's tax base. Washington requires, in addition, that the

measure of the other jurisdiction's tax be labeled "gross volume" or "gross receipts" and that the calculation of the other jurisdiction's tax conform to that of Washington, with no deductions allowed that could cause the tax to be labeled (by *Washington*, and not the taxing jurisdiction) a value added or income tax. *Id.* § 82.04.440(5)(a)(i). App. 49a.

The need for such perfect conformity accounts for the fact that general business taxes of only three other states (Delaware, Hawaii and Indiana) have qualified for the interstate credit. App. 27a-29a. As a result, interstate businesses paid the State $384 million of B&O taxes during the 1987-89 biennium but received only $1.3 million of interstate credits during the first seventeen months of the credit's operation. *See* App. 22a, 34a. By contrast, if the tax burdens had been equalized via the generally accepted three-factor apportionment principle, the reduction of Washington tax burden on interstate commerce would have been, by the State legislature's own reckoning, $200 million—or *100 times* the aggregate credit afforded interstate commerce under the interstate credit. *See* App. 24a-25a.

The Proceedings Below

Petitioners' joint action for refunds of the challenged taxes was submitted to the trial court on stipulated facts (*see* App. 20a-46a) and was decided on cross motions for summary judgment. The court denied Petitioners' motion and granted the State's motion, dismissing Petitioners' actions on July 21, 1989. App. 18a-19a.

The Washington Supreme Court affirmed on March 1, 1990. App. 1a-17a. Although the court correctly noted that Petitioners do not claim the 1987 revision lacked internal consistency (App. 8a), a significant portion of the court's opinion focused on that subject. The court dismissed Petitioners' concerns about continued discrimination under the revised statutory language, noting that this Court's dicta in *Tyler Pipe* seemed to sanction credits.

App. 4a-5a. Given the State's apparent compliance with a perceived invitation from this Court, the court gave scant attention to the design of the credits or their practical economic effect. The court thus rejected, substantially without reasoning, Petitioners' arguments that the legislature had crafted the credits so narrowly as to make them effectively unavailable to interstate manufacturers. App. 10a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S RECENT INVITATION TO USE CREDITS AS A MEANS OF AVOIDING DISCRIMINATION HAS BEEN EXPLOITED BY WASHINGTON TO PERPETUATE FACIAL DISCRIMINATION AND AVOID EQUALIZATION OF TAX BURDENS.

This Court has several times, by way of dicta, encouraged states in the use of credits. *Tyler Pipe* suggested that "presumably" Washington could cure its discrimination with a credit. 483 U.S. at 249. More recently the suggestion has been made that a credit may help avoid multiple taxation. *See Goldberg v. Sweet*, 109 S. Ct. 582, 590 (1989).[5]

But the way that a credit can be used for these purposes has not been defined. Except for the venerable credit for sales tax applied against a use tax, approved over 50 years ago in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937),[6] the use of a credit to avoid discrimination has not been examined in actual operation.

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[5] In *Goldberg*, after holding that there was no substantial problem of multiple taxation, the Court observed: "To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation." 109 S. Ct. at 590.

[6] *Accord, D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) ("The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States.").

Washington has seized upon the Court's dicta in *Tyler Pipe* and exploited it as a device to save its tax without equalizing burdens between local and interstate commerce. Although the Washington tax, after *Tyler Pipe*, has reverted to the structure it had before it was turned "inside out," the practical effect remains the same: in either version, interstate businesses pay for *both* the privilege of manufacturing *and* the privilege of selling. Wholly local businesses pay tax on only *one* of those two privileges—receiving the automatic local credit that eliminates the other tax. The interstate credit, by contrast, has been so narrowly drawn as to be effectively unavailable to interstate businesses. The enactment of the interstate credit, therefore, amounts to little more than a subterfuge through which facial discrimination condemned in *Tyler Pipe* is perpetuated.

The court below offered no analysis of the facial discrimination issue—apart from its lengthy discussion of "internal consistency" (a discussion undertaken despite acknowledging Petitioners' agreement that the tax does not lack internal consistency). App. 8a. The court's reasoning suggests a mistaken belief that facial discrimination means no more than a lack of internal consistency.[7]

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[7]Asserting that Washington's failure to grant a credit for taxes like Oregon's tax "cannot constitute facial discrimination," the court seemed to rationalize that conclusion by merging the facial discrimination concept with lack of internal consistency:

> Facial discrimination must involve giving local businesses a credit not available to interstate businesses.
>
> The United States Supreme Court struck down the predecessor tax because it lacked "internal consistency." *Tyler* at 247.

App. 5a. Compare Justice O'Connor's concurring opinion in *Tyler Pipe*, 483 U.S. at 253, which is predicated on the "facially discriminatory nature" of the schemes in that case (and in *Armco*), and *contrasting* a tax suffering *only* from lack of internal consistency such as that in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), in which Justice O'Connor, joined by the Chief Justice and Justice Powell (author of the *Armco* decision), dissented.

Thus, the court below avoided confronting the real issue (discrimination) by addressing an issue not present in this case (internal consistency).

Despite the dryly technical language of the rephrased tax—and the ingenious blending of a local credit that is automatic with an interstate credit that is not automatic —the facial discrimination condemned in the prior versions of the tax persists. The design of the tax is as restrictive as the application the State has given it. Further, even if the State's application of the statute were not compelled by its design, it is apparent on the stipulated record that the tax as applied discriminates against interstate commerce in violation of the Commerce Clause. This Court has long stressed the importance of practical operation in passing on the constitutionality of state taxes.[8]

Discrimination in application can be seen by comparing purely local sales with those that cross the state line between Washington and Oregon. An Oregon manufacturer must pay a tax under Oregon's "Corporation Excise Tax Law"—imposed on "*manufacturing* and business corporations for the *privilege of carrying on or doing business* in this state . . . ." Or. Rev. Stat. §§ 317.005, .010(5), .070 (1989) (emphasis added). App. 53a.[9] The

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[8] *E.g., Educational Films Corp. of America v. Ward*, 282 U.S. 379, 387 (1931) ("[T]he nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it."); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1931) ("The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (Citation omitted.)).

[9] Similarly, the Washington B&O tax imposes on every person a tax "for the act or *privilege of engaging in business* activities" and specifically "for engaging within this state in business as a manufacturer" as well as for the privilege of selling at wholesale or

Oregon manufacturer that sells in Washington must also pay the Washington privilege tax on selling. Wash. Rev. Code §§ 82.04.250, .270. App. 48a. The wholly local Washington manufacturer does *not* pay any Washington selling tax; its payment of the Washington manufacturing tax earns it the automatic local credit against the selling tax. The Oregon manufacturer, on the other hand, is not eligible for the interstate manufacturer credit, despite having paid the Oregon tax on the privilege of manufacturing in that state, because only taxes formulated exactly like Washington's are eligible for the interstate manufacturer credit. *See* App. 27a-29a. Oregon labels its tax an "excise tax." The court below stated that while out-of-state taxpayers, like in-state taxpayers, may use credits, "[n]either may use other kinds of taxes, such as *excise* tax [sic], for credits." App. 9a (Citation omitted; emphasis added). Thus, although Oregon's tax—like Washington's—is imposed on the "privilege" of "doing business" including a "manufacturing" business, it is not eligible for Washington's credit.

A fact not expressly noted by the court below, but apparent on the face of Washington's statute, is that deductions which are allowed (under Oregon law) in determining the Oregon tax base would cause Oregon's tax to be labeled an "income tax" under Washington law, and therefore ineligible for the interstate credit. Wash. Rev. Code § 82.04.440(5)(a)(i). App. 49a. This is so even though the Oregon Supreme Court has held that Oregon's tax is not an income tax. *Pacific First Fed. Sav. Bank v. Department of Revenue*, 308 Or. 332, 779 P.2d 1033 (1989).[10] Washington's statute expressly pro-

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retail. Wash. Rev. Code §§ 82.04.220, .240, .250, and .270 (emphasis added). *See* App. 47a-48a.

[10] The Oregon court explained:

> [T]his court has determined that the Excise Tax is not an income tax. *John I. Haas, Inc. v. Tax Com., supra*, 227 Or. at

vides that its terms prevail over the characterizations that other states may give their taxes. Wash. Rev. Code § 82.04.440(5)(e). App. 50a.

Discrimination against Oregon businesses likewise persists when the direction of the commerce is reversed. When goods are manufactured in Washington, the credit earned can be used only by selling locally. The local manufacturer selling into Oregon receives no such benefit. The result is like that in *Maryland v. Louisiana*, 451 U.S. 725, 756-57, 759 (1981) (a "first use" tax discriminated against interstate commerce because by paying the tax, in-state producers obtained credits against other Louisiana tax liabilities which were of no use to purely interstate businesses).

An examination of taxes employed by other states that are, like Oregon, major trading partners of Washington helps to reveal the extent of the discrimination. The State of Michigan, where Petitioners Ford and Chrysler manufacture, supplies Washington with many of its automobiles. Michigan's tax is encompassed by the term "value added tax" employed in Washington's statute. Wash. Rev. Code § 82.04.440(5)(a)(i). App. 49a. It effectively allows a single deduction from gross receipts for the cost of goods purchased.[11] But Washington's restrictive interstate credit applies only to pure "gross receipts" taxes; it is allowed against another state's tax only if any "deductions allowed would not constitute the tax

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192, 361 P.2d 820, held that the Excise Tax "is not a tax on net income, but rather is a tax on the privilege of doing business."

Pacific First, 779 P.2d at 1036.

[11] *See Mobil Oil Corp. v. Department of Revenue*, 422 Mich. 473, 373 N.W.2d 730, 741 n.13 (1985). *See also* Mich. Comp. Laws § 208.1, .3, .31 (1989) (App. 52a-53a); J. Pechman, *Federal Tax Policy* 197 (4th Ed. 1983) ("For any given firm, value added is the difference between receipts from sales and amounts paid for materials, supplies, and services purchased from other firms.").

. . . [a] value added tax." *Id.* App. 49a. As applied to Michigan's tax, therefore, the allowance of even a single deduction has caused loss of eligibility for Washington's credit.

The State of Alaska, which supplies Washington with much of its fish products, taxes the processing of fish. The measure of the tax is the value of the fish (Alaska Stat. §§ 43.75.015, .140(11) (1989). App. 51a-53a), just as the measure in Washington is the "value of the products . . . extracted." Wash. Rev. Code § 82.04.230. App. 47a. However, Alaska's drafting does not conform precisely enough to that of Washington to qualify for the credit, because Alaska determines the value prior to processing rather than after. Alaska Stat. § 43.75.140(11). App. 52a. Alaska's tax, like Michigan's, is ineligible for Washington's interstate credit. *See* App. 31a. Similarly, Alaska's Oil Production Tax (Alaska Stat. §§ 43.55.011 (1983), 43.55.900(7) (1989). App. 50a-51a) has so far failed to qualify for the credit even though it is measured by the "gross volume of business" standard that Washingon's credit requires. *See* App. 27a-29a.

It is apparent that if Oregon, Michigan, and Alaska adopted credits that required other states to conform the labels and precise calculation of their taxes as Washington's credit requires, all four States would have credits for which none of the others could qualify. Washington's narrowly tailored credit thereby serves to defy the axiom of Commerce Clause law that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco*, 467 U.S. at 642. That is precisely the result when goods are exchanged with Oregon and nearly every other state.[12]

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[12] Given the relevant geography and populations, it is no surprise that the allowance of a credit for a tax in Delaware, Indiana, and Hawaii does not have any significant economic effect on the tax burdens Washington imposes on Petitioners and other interstate businesses.

For example, if Washington had employed the three-factor apportionment formula that its legislature recognized as "standard practice in states with corporation income taxes" (App. 24a) to cure its discrimination, interstate businesses would have received a true equalization of their tax burden *100 times more beneficial* than the token adjustment allowed under the illusory interstate credit.[13]

Because this Court itself has suggested credits as a way of correcting discriminatory taxes, Petitioners respectfully point out the need for the Court to curb subversion of its intended use of that legislative tool if the Court is to preserve the integrity of its decision in *Tyler Pipe*, as well as its doctrine that practical effects govern over formalisms in Commerce Clause law. Otherwise, Washington's artifice will serve as a model that can be repeated in all other states. It will not be lost on other states that Washington will have "cured" the discrimination condemned in *Tyler Pipe* without eliminating the reality of disparate treatment of local and interstate businesses. Washington's amended B&O tax demonstrates how imaginative use of labels or other trivial distinc-

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[13] The Washington legislature recognized, as it faced the task of equalizing burdens, that interstate manufacturers like these taxpayers would pay an estimated $384 million in B&O taxes during the 1987-89 biennium and that a bit more than half ($200 million) of this would be lost if the state were to "apportion the B&O tax" in accordance with the three-factor formula that Washington recognized as standard practice. App. 22a, 24a-25a. Effectively Washington recognized, therefore, that the taxable activities of such manufacturers were weighted about 52% outside the state (200 : 384 = 52). Yet Washington succeeded in devising a credit so narrowly drawn that the estimated $384 million collective tax bill of such manufacturers was reduced by only $1.3 million during 17 months of the biennium (suggesting that the maximum reduction would not exceed $2 million for the entire biennium). *See* App. 34a.

tions can assure that "credits" are not awarded even-handedly.[14]

II. WASHINGTON REQUIRES OTHER STATES TO CONFORM THEIR TAX STATUTES STRICTLY TO THE FORM OF ITS OWN BEFORE THEIR TAXPAYERS CAN RECEIVE EQUAL TREATMENT WITH WASHINGTON'S WHOLLY LOCAL BUSINESSES—A DEVICE PROHIBITED BY THIS COURT'S RECENT DECISION IN *NEW ENERGY CO. v. LIMBACH*.

The amended B&O tax employs an impermissible device to strip the interstate credit of practical economic effect. The credit requires that other states conform their taxes strictly to the labels and precise articulation of tax adopted by Washington, including the same method of calculation. Such forced conformity has been condemned in a recent unanimous decision of this Court. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), a credit was applied against the Ohio fuel tax for inclusion of ethanol as a component of fuel. The credit was extended

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[14] It must be emphasized that the vice here is not multiple taxation *per se*, but rather *disparity of treatment* in dealing with that issue. It has long been recognized that states may tax a manufacturer at "both ends," because the state of origin can tax the manufacture, and the state of destination can tax the selling. Taxes have been permitted at both ends of an interstate transaction—origin and destination—because it was "valid for the State of destination to tax interstate sales and for the State of origin to include such sales in the measure of production taxes." Report of Special Subcommittee on State Taxation, "Development of State Gross Receipts Taxes," S. Rep. No. 658, 91st Cong., 1st Sess., n.10 (July 1969). *Tyler Pipe* noted that Washington could have equalized burdens by eliminating the exemption for local business and taxing it at both ends, as with interstate commerce. 483 U.S. at 249. Washington's legislature elected not to do so, seeing that as "double taxation." *See* App. 23a-24a. Being unwilling to equalize burdens by taxing local business at both the manufacturing and selling ends of the business, the legislature was obliged to provide a comparable benefit for interstate businesses.

to ethanol produced in other states, but only on condition that the other states grant a similar tax advantage to ethanol produced in Ohio. This Court invalidated the tax. Noting the "economic disadvantage" imposed on out-of-state sellers by Ohio's scheme, the Court concluded that "the promise to remove that [economic disadvantage] if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion." *Id.* at 275.

In effect, Washington is saying to other states: "Your producers and sellers can have parity of tax treatment with local taxpayers in Washington only on condition that you conform your tax scheme exactly to ours, including the labels and the details of calculation." Thus, on the face of the tax, there is disparity of treatment *in fact*. *New Energy* imposes upon the State a "high" burden of justification to save such disparity from constituting illegal discrimination. *Id.* at 278.

By implication, the court below appears to rest its decision on an unexamined premise—that taxes calculating the liability differently than Washington does are "dissimilar" to Washington's tax in a constitutionally significant way.[15] This case, therefore, presents the important question whether differences in the labels and

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[15] The court below gave the *New Energy* requirement short shrift. Denying that "the new statute requires conformity to other states' taxes as a condition to equal treatment," the court offered the following rather opaque explanation: "Out-of-state taxpayers, like in-state taxpayers, can use credits on one activity to offset taxes on another. Neither may use other kinds of taxes, such as excise tax [sic] for credits. *Cf. New Energy Co. v. Limbach*." App. 9a-10a (citations omitted). Evidently, the court below would dismiss the privilege taxes of Oregon, Alaska, and Michigan as "other kinds of taxes." Elsewhere in its opinion as it discussed "internal consistency," the court observed that "internal consistency does not require states to grant credits for dissimilar taxes" and added, "The Supreme Court has never required a state to offer credits for dissimilar taxes." App. 6a-7a (citations omitted).

formal articulation of a tax have sufficient constitutional significance to meet the high standard of justification for disparity of treatment required by *New Energy*.

Just as the requirements of the Commerce Clause would be eviscerated if Washington could condition equal treatment of Oregon taxpayers on Oregon labeling its tax a "Business and Occupation Tax" the same as Washington does, the insistence by Washington that other states conform to its taxable "incidents" (*i.e.*, other state taxes must expressly *name* "manufacturing" or "extracting" as the incidents to which the tax is fastened) is likewise improper. Even the court below condemned reliance on such formalisms as contrary to *Complete Auto Transit*—although the court failed to act consistently by condemning the B&O tax for this reason.[16] App. 7a.

Similarly, just as Washington could have no legitimate interest in dictating the tax rates that Oregon or other states employ, Washington can have no legitimate interest in specifying the deductions that other states can or cannot allow. Deductions, as they function to narrow the tax base, perform a function comparable to that of tax rates. The tax revenue is the product of the rate times the base. The rate and base factors are kept in balance to arrive at the bottom line tax that the state desires.[17]

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[16] In responding to the charge that facial discrimination exists where goods cross the Oregon-Washington state line, the court dismissed as having no constitutional significance the fact that Oregon's tax (like Washington's) is imposed on the privilege of doing business: "*Complete Auto Transit* precludes any court from attaching constitutional significance to this particular formal similarity." App. 7a. Yet that is precisely the formalism that Washington's tax requires other states to adopt as a condition to equal treatment of their taxpayers.

[17] Broadly based taxes that permit few deductions (like those labeled "gross receipts taxes" and "value added taxes") tend to have lower rates (Washington's being less than .5%); conversely, as deductions narrow the tax base, the rate tends to be higher (Oregon's being 6.6%). *See* Wash. Rev. Code §§ 82.04.230, .240, .250, .270; App. 47a-48a; Or. Rev. Stat § 317.061 (1989); App. 53a.

These details of tax calculation are peculiarly within the province of each state. The principle confirmed in *New Energy* should make it impermissible for one state to dictate to another as to such matters—at least where it does so by conditioning parity of tax treatment on the conformity of other states to such dictates.

Indeed, this Court has already cut through such nice distinctions. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), this Court upheld an income tax apportionment formula that depended entirely upon the single factor of sales by expressly recognizing that a single-factor income tax formula achieves the same basic result as Washington's B&O tax on selling activity. In short, the Court refused to exalt the form of a tax over its substance. Noting the prior approval of a tax on the gross receipts from sales made into Washington State, *see Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975), the Court in *Moorman* observed, "In this case appellant's actual income tax obligation was the rough equivalent of a one percent tax on the entire gross receipts from its Iowa sales." 437 U.S. at 280.[18]

The disparity of treatment in Washington's tax is that it rests on distinctions not relevant to the task of equalizing burdens. Formalisms, such as whether the tax incident is labeled "extracting" or "manufacturing" or whether the rate is applied before or after deductions, do not distinguish another state's tax from Washington's in terms of practical economic effect and the burden thereby imposed on interstate commerce.[19]

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[18] *Moorman* shows that an interstate taxpayer which sells into an income tax state with a single-factor sales formula is burdened at the "selling end" of its business analogously to the burden imposed by Washington's B&O tax on selling.

[19] The important criterion is whether other states' taxes include in their measure the revenues or values that Washington taxes. By contract with taxes imposed on businesses, Petitioners take no issue with the exclusion from Washington's credit of *consumer* taxes such as sales or use taxes, *i.e.*, taxes which are "pursuant to law

Not since the era before *Complete Auto Transit*, when "draftsmanship and phraseology" were paramount, have formalisms and distinctions between income taxes and privilege or gross receipts taxes been considered critical.[20]

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or custom, separately stated from the sales price." Wash. Rev. Code § 82.04.440(5)(a)(ii). App. 49a. This Court has recently recognized the same distinction in *Goldberg*, 109 S. Ct. 582, in the context of the discrimination prong of the *Complete Auto Transit* test. The Court distinguished the flat taxes on trucks struck down in *Scheiner*, 483 U.S. 266, based on where the "economic burden" of the tax fell. The economic burden of the Illinois telecommunications tax sustained in *Goldberg* fell on the consumer. By contrast, the flat tax struck down in *Scheiner* "burdened out-of-state truckers who would have difficulty in effecting legislative change." *Goldberg*, 109 S. Ct. at 591. The consumer, on the other hand is an "insider who presumably is able to complain about and change the tax through the . . . political process." *Id.*

The Washington B&O tax is imposed upon Petitioners for the "privilege of engaging" in interstate business and expressly denies that it is imposed upon consumers: "It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers . . . [rather] . . . such taxes shall constitute a part of the operating overhead of . . . persons [engaging in business]." Wash. Rev. Code § 82.04.500. App. 50a.

[20] Before *Complete Auto Transit* such differences were often critical. In 1959 the Court distinguished between income taxes and so called "privilege" taxes. *See Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). Holding that a state *income* tax could be imposed on an out-of-state corporation engaged exclusively in interstate selling, the Court "nevertheless affirmed its decision in *Spector Motor Service v. O'Connor* [340 U.S. 602 (1951)] in which it had invalidated a tax similar in virtually every respect to the tax at issue in *Northwestern*, except that it was levied on the *privilege* of doing business in the state." Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 55 (1987) (emphasis added; footnote omitted). Nearly twenty years after *Northwestern*, however, the decision in *Complete Auto Transit* overruled *Spector* and swept away such nice distinctions in Commerce Clause law replacing them with a concern for the pratical economic effects of the tax. 430 U.S. 288-89.

From a practical effects perspective, there is no meaningful difference between Iowa's single-factor formula and Washington's tax on selling. Indeed, even the *Moorman* dissent said, "I agree with the Court that, for purposes of constitutional review, there is no distinction between a corporate income tax and a gross receipts tax." 437 U.S. at 281 (Brennan, J., dissenting).

CONCLUSION

Washington's justification for disparity of treatment based on differing tax measures presents important constitutional questions because it (i) sanctions a continuation of facial and applied discrimination condemned in *Tyler Pipe;* (ii) amounts to forced conformity in matters irrelevant to the task of equalizing burdens, contrary to the rule of *New Energy*; and (iii) reverts to formalism in tax systems, rather than the practical concern for economic burdens, thereby encouraging other states to adopt similar formalisms to favor local businesses. Review by this Court is thus necessary to prevent evasion of its prior decision and widespread burdens on interstate commerce. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 56348-9

AMERICAN NATIONAL CAN CORPORATION, *et al.*, *Appellants*,

v.

THE DEPARTMENT OF REVENUE, *et al.*, *Respondents*.

(En Banc—March 1, 1990)

Bogle & Gates, *John T. Piper*, *D. Michael Young*, and *James R. Johnston*, for appellants.

Kenneth O. Eikenberry, *Attorney General*, and *William B. Collins*, *Assistant*, for respondents.

UTTER, J.—On June 23, 1987, the United States Supreme Court partially invalidated Washington's business and occupation tax (hereinafer B&O tax). *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 483 U.S. 232, 253, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987). The Legislature amended the B&O tax statute on August 11, 1987. A group of businesses engaged in interstate commerce asks us to invalidate the newly amended statute. They also seek a refund for taxes paid during the 6 weeks which elapsed between the date of the Supreme Court decision, June 23, 1987, and the date the Legislature amended the statute, August 11, 1987.[1] We refer to this period as the interim period.

[1] Taxpayers also argued that the 3 percent interest rate paid on refunds is unconstitutional. Since we find that they are not entitled to a refund, we do not address this issue.

We conclude that the new law is constitutional and applies to the interim period. Therefore, the litigants are entitled to the credits provided by this statute, but the litigants are not entitled to a full refund.

I

Washington imposes the B&O tax on the "privilege of engaging in business activities" in the state. RCW 82.04.220. It collects .44 percent of the gross receipts of wholesalers and retailers earned here and .44 percent of the value of products manufactured or extracted here. *See* RCW 82.04.220-.250; RCW 82.04.270.

The B&O tax statute contained a "multiple activities exemption" prior to August 1987. *See* RCW 82.04.440 (1986). This provision protected manufacturers who wholesale or retail their products from double taxation by exempting them from the tax on manufacturing. RCW 82.04.440.

We rejected a constitutional challenge to this exemption in *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 715 P.2d 128 (1986). The United States Supreme Court reversed this decision in *Tyler Pipe Indus., Inc. v. Department of Rev., supra.*[2] It found that Washington's law discriminated against interstate commerce. Manufacturers who sold their products out of state had to pay a tax on manufacturing, while in-state manufacturers who sold their goods in state would pay a tax on the sale but not on the manufacture. *See Tyler*, 483 U.S. at 234. The Supreme Court left the issue of remedy open on remand. *Tyler*, 483 U.S. at 253. In *National Can Corp. v. Department of Rev.*, 109 Wn.2d 878, 749

[2] It also vacated and remanded this court's decision in the companion case to *National Can, Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, 715 P.2d 123 (1986). The United States Supreme Court's decision in *Tyler* clearly affirmed this court's ruling with respect to the nexus issues presented in *Tyler*, 105 Wn.2d 318, while overruling its decision in *National Can*.

P.2d 1286, *cert. denied*, 108 S. Ct. 2030 (1988), this court denied the taxpayers refunds for payments made prior to June 23, 1987, the date the Supreme Court's decision in *Tyler* took effect.

On August 11, 1987, the Washington Legislature passed the 1987 credit law, designed to remedy the constitutional defects the United States Supreme Court identified in *Tyler*. Laws of 1987, 2d Ex. Sess., ch. 3 (hereinafter 1987 credit law). This law attempts to remedy the problem by replacing the old "multiple activities exemption" with a "2-way credit." 1987 credit law, § 2 (codified at RCW 82.04.440). The new law gives businesses a credit for gross receipts taxes paid to this or any other state.

The parties stipulated to a set of facts for purposes of this litigation. In response to interrogatories, the Department of Revenue has identified taxes in 58 jurisdictions which qualify for credit under the new law. See Clerk's Papers, at 787-90. Most of these taxes are local government taxes, not state taxes. The list does include three general state taxes, those of Delaware, Hawaii and Indiana.

The record reveals that interstate taxpayers have claimed $1,303,973 worth of credits between June 1987 and October 1988. Clerk's Papers, at 791. The record also shows that taxpayers have paid $2,769,978 in taxes during the 6-week interim period. The trial court ruled on cross motions for partial summary judgment on July 21, 1989. It ruled that the 1987 credit law was constitutional. On the other hand, it ruled that taxpayers owed no taxes for the interim period. Cross appeals ensued.

II

The taxpayers argue that the new tax law discriminates against interstate commerce, violates principles of equal protection, and violates their rights to due process

of law. We believe the new law does not discriminate against interstate commerce and that the equal protection and due process arguments have no merit.

Article 1, section 8, clause 3 of the United States Constitution gives Congress the power to regulate interstate commerce. For over a century the United States Supreme Court has inferred limitations on state taxation of interstate commerce from the negative implications of this affirmative grant of power. *See generally* Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 A.B.A. Tax Law. 37 (1987).

In recent years, the Supreme Court has required that state taxes meet a 4-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). Under this test, state taxation of interstate business must (1) tax only interstate activities having a sufficient connection to the taxing state (nexus requirement); (2) be fairly apportioned to taxpayer's activities in the state (apportionment requirement); (3) not discriminate against interstate commerce (nondiscrimination requirement); and (4) be fairly related to the services provided by the state.

The taxpayers claim that the law as amended discriminates against interstate commerce, just as its predecessor did. They concede that the new tax meets the other requirements of *Complete Auto Transit*. Brief of Appellants, at 24.

The United States Supreme Court held that the predecessor of the new law discriminated on its face. *See Tyler*. The Court's suggestions to our Legislature on how to remedy the constitutional violation follow from this understanding. The Court wrote:

> Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for

> manufacturing taxes paid to other States would presumably cure the discrimination. . . .

483 U.S. at 249.

The Legislature chose to provide manufacturers with a credit for manufacturing taxes paid to other states. It also created parallel credits for seller's taxes and extractor's taxes. The credit applies only to gross receipts taxes. 1987 credit law, § 2.

The taxpayers do not challenge the interpretation of the statute or the Department's selection of taxes. If they did, section 1 of the legislation would require this court to construe the statute to avoid constitutional difficulties. *See* 1987 credit law, § 1. Nor do they argue that the Legislature or the Department failed to provide credits for every manufacturing tax. The taxpayers in effect concede that the Legislature did what the Supreme Court said was necessary in *Tyler*.

But they object to the fact that by its terms the new law grants no credits for income taxes or excise taxes paid in other states. See Brief of Appellants, at 28-30, 42. This state, however, does not have a corporate income tax. Taxpayers apparently argue that Washington must give them a deduction for taxes which Washington does not exact from local manufacturers. Washington's failure to do this cannot constitute facial discrimination. Facial discrimination must involve giving local businesses a credit not available to interstate businesses.

The United States Supreme Court struck down the predecessor tax because it lacked "internal consistency." *Tyler*, at 247; *see generally The "Internal Consistency" Test is Alive and Well: Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 41 A.B.A. Tax Law. 587 (1987). Internal consistency has little to do with consistency within the statute. Rather, an internally consistent tax is one that would not impermissibly burden

free trade if applied by every jurisdiction. *Tyler*, at 247.[3]

If every jurisdiction had a tax like the one Washington had when the Supreme Court decided *Tyler*, all states would discriminate against interstate commerce. The manufacturer—sellers in a state would pay only one tax. A business which manufactured in one state and sold in another would pay taxes on both the value of the manufactured goods and on the sales receipts.

If every jurisdiction in the union had a B&O tax as amended in 1987, no discrimination would occur. Every interstate business could claim a credit for taxes paid in sister states. Neither intrastate nor interstate businesses would pay double tax.

The Supreme Court's recent decision in *Goldberg v. Sweet*, —— U.S. ——, 102 L. Ed. 2d 607, 109 S. Ct. 582 (1989), shows that internal consistency does not require states to grant credits for dissimilar taxes. In that case, the Court upheld a state tax on telecommunications. The Court explained:

> To be internally consistent, a tax must be structured so that if every State were to impose an *identical* tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation

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[3] The Supreme Court originally developed the internal consistency test in the apportionment context. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169, 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983). In *Tyler* and in *Tyler's* predecessor, *Armco Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), the Court used this test in the context of an inquiry into whether a tax was discriminatory. It did this because the Court thought it discriminatory for a state to not offer interstate businesses a credit for out-of-state taxes which directly parallel taxes for which an intrastate business could claim a credit. Logically, an inquiry into discrimination cannot involve out-of-state taxes having no parallel in Washington.

where other States have passed an identical statute. . . .

> Appellant Sprint argues that . . . under *Armco* [*Inc. v. Hardesty*, 467 U.S. 638 (1984)], a court evaluating the internal consistency of a challenged tax must also compare the tax to the similar, but not identical, taxes imposed by other States. Sprint misreads *Armco*. If we were to determine the internal consistency of one State's tax by comparing it with slighly different taxes imposed by other States, the validity of state taxes would turn solely on "the shifting complexities of the tax codes of 49 other States.". . .

(Citations omitted. Italics ours.) *Goldberg*, 109 S. Ct. at 589.

The Supreme Court has never required a state to offer credits for dissimilar taxes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937) (use tax held nondiscriminatory because credits provided for out-of-state use or sale taxes); *D.H Holmes Co. v. McNamara*, 486 U.S. 24, 100 L. Ed. 2d 21, 108 S. Ct. 1619, 1623-24 (1988) (holding tax to be fairly apportioned because state allowed credit for similar taxes).

Taxpayers have not expressly argued that Washington failed to give them a credit for similar taxes. They have pointed out that Oregon's excise tax, a tax on corporate income, is also a tax on the privilege of doing business in the state. Brief of Appellants, at 28. They do not argue that this characterization makes it similar to Washington's tax, because a precedent they rely upon heavily, *Complete Auto Transit*, precludes any court from attaching constitutional significance to this particular formal similarity. *See Complete Auto Transit, Inc. v. Brady*, *supra* at 274 (overruling *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508

(1951), which made taxes on the privilege of doing business unconstitutional).

Taxpayers have conceded, as they must, that the new law is internally consistent. Forced to concede that the new law cures the crucial defect identified in *Tyler*, they argue that the Supreme Court's decision in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987) supports their position. That case, decided the same day as *Tyler*, invalidated a flat tax imposed on truckers. *Scheiner* does not support their position.

The Supreme Court did not invalidate the flat tax at issue in *Scheiner* because of discrimination against interstate commerce. It invalidated it because it treated out-of-state truckers worse than in-state truckers when both were engaged in interstate commerce. *See Scheiner*, at 281-82. Thus, the whole case has no bearing on many of the taxpayers before this court. Many of these businesses are local businesses which sell out of state.

Secondly, the *Scheiner* court ruled that the flat tax was internally inconsistent. *Scheiner*, at 282-83. It reached this result because the out-of-state truckers paid five times as much per mile as did in-state truckers. *Scheiner*, at 285-86. Taxpayers concede that the new law is internally consistent. Reply Brief of Appellants, at 35.

The *Scheiner* court justified its decision by saying that out-of-state truckers paid the same flat tax for a much less valuable privilege. Taxpayers argue that under Washington's statute, manufacturers from income tax states get only one privilege, the right to sell, for their B&O tax. Reply Brief of Appellants, at 46-47. Intrastate businesses get the right to sell and manufacture for the same price.

This argument rests "on the erroneous assumption that through the B&O tax, Washington is taxing the unitary activity of manufacturing and wholesaling." *Tyler*,

483 U.S. at 251. But *Tyler* teaches that we must view wholesaling "whether by an in- state or an out-of-state manufacturer . . . as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler*, at 251. Hence, a wholesaler pays tax on the gross receipts of sales in state. The fact that no wholesaler will pay Washington tax on manufacturing if he or she manufactures the products sold is irrelevant. *Tyler* requires us to reject taxpayers' argument that a business which sells and manufacturers in state purchases two privileges with its wholesaling tax.

Moroever, the Supreme Court precedent sustaining sales and use taxes precludes accepting this argument. That precedent requires us to compare burdens imposed on products even when taxes are imposed on privileges. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937) shows this. In that case, the Supreme Court upheld a Washington use tax which gave credit for use or sales taxes paid in Washington or other states. The Court could have said that the user of in-state products pays one tax for two privileges, since the use tax was levied on the privilege of using personal property. *See Henneford*, at 579. The resident taxpayer pays one tax and gets two privileges, purchase and use. A taxpayer from out of state pays one tax and gets only one privilege for the tax, use. The Court, however, sustained the use tax. Were we to accept the two privileges argument, we would cast into doubt Supreme Court precedent sustaining sales and use taxes.

Taxpayers also argue that the new statute requires conformity to other states' taxes as a condition to equal treatment. Brief of Appellants, at 34. It does nothing of the sort. Out-of-state taxpayers, like in-state taxpayers, can use credits on one activity to offset taxes on another. Neither may use other kinds of taxes, such as excise tax, for credits. *Cf. New Energy Co. v. Limbach*, 486 U.S. 269, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988) (invali-

dating ethanol credit on fuel made available only to in-state producers or out-of-state producers from states providing a similar credit).

The heart of taxpayers' arguments is the alleged continuing discriminatory effect of Washington's tax. This argument has no factual basis.

Businesses have applied for $1,304,000 worth of credits under the new law. This amount is a small fraction of the total tax the state collects from interstate manufacturers. The taxpayers use these facts to suggest that the amendment had no practical effect and therefore did not remedy the discrimination the Tyler Court identified. Brief of Appellants, at 19-26.

The fact that businesses have applied for $1,304,000 worth of credits proves beyond a shadow of a doubt that the new law had a practical effect. Taxpayers' argument can only be understood as a complaint about the magnitude of the effect.

But the *Tyler* Court did not base its decision on the magnitude of the problem the litigants presented. Indeed, the *Tyler* Court specifically rejected the argument that taxpayers needed to examine tax burdens in other states in order to conclude that the tax was discriminatory. *See Tyler*, 483 U.S. at 247. We cannot conclude that discrimination continues because the revenues flowing from credits based on out-of-state taxes disappoint the expectation of the taxpayers or fall short of the estimates of the government.

The taxpayers argue that the Legislature intended to enact legislation making no practical difference. But taxpayers' own brief asserts that the Legislature expected the new legislation to cost the state between $32 million and $42 million dollars. Brief of Appellants, at 7. The motives of the Legislature are probably irrelevant to the question of whether a tax law discriminates against interstate commerce. *See Henneford v. Silas Mason Co., supra*

at 586 (improper motives will seldom or ever cause invalidation of a tax); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 78 L. Ed. 1109, 54 S. Ct. 599 (1934) (the motives of the Legislature are irrelevant to questions of state taxation under the due process clause).

Moreover, the State's desire to maintain its revenues is proper. Indeed, the Supreme Court has repeatedly stated that the commerce clause does not relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. *See, e.g., Complete Auto Transit*, 430 U.S. at 279; *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250, 254, 82 L. Ed. 823, 58 S. Ct. 546 (1938). State tax revenues fund every beneficial action the state takes.

The legislative intent appears in section 1 of the 1987 credit law:

> It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity . . . between . . . taxpayers.

1987 credit law, ch. 3, §1. These motives are proper.

Taxpayers only challenge the discriminatory effect of the new law. They concede that the tax is fairly apportioned. Brief of Appellants, at 24.

A long line of precedent has held that Washington's B&O tax meets the fair apportionment test. *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 564, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 826-30, 659 P.2d 463, appeal dismissed, 464 U.S. 1013 (1983). This court ruled that the B&O tax without the 2-way credit posed no apportionment problem in *National Can Corp. v. Department of Rev.*, 105

Wn.2d 327, 340-42, 715 P.2d 128 (1986). The Supreme Court did not disagree. Indeed, it rejected Tyler's fair apportionment challenge to the wholesale tax. *Tyler*, 483 U.S. at 253.

The taxpayers point out that the Legislature failed to adopt an apportionment formula commonly used to allocate a national corporation's tax base among states having corporate income taxes. Brief of Appellants, at 5. They argue that the Legislature by rejecting the formula and adopting the 2-way credit chose "phraseology" designed to have no practical effect. The record does not show that the Legislature or any of its committees ever voted on an apportionment formula. But memoranda by committee staff pointed out that adoption of an apportionment formula might remedy the problem identified in *Tyler*. These facts say nothing about whether the tax is discriminatory.

The new tax does not violate principles of equal protection. Equal protection requires that a challenged tax classification have a legitimate purpose to which the tax is rationally related. *Hooper v. Bernalillo Cy. Assessor*, 472 U.S. 612, 618, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985). This case does not resemble the domestic preference taxes which the Supreme Court struck down in cases cited by taxpayers. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (striking down 5 to 4 a tax imposing 3 to 4 percent taxes on out-of-state insurer's premiums while taxing domestic insurers at 1 percent), *reh'g denied*, 471 U.S. 1120 (1985); *Williams v. Vermont*, 472 U.S. 14, 86 L.Ed.2d 11, 105 S.Ct. 2465 (1985) (striking down a credit for out-of-state sales tax on automobiles made available to in-state residents only). Having concluded that the new tax does not discriminate against interstate commerce, we likewise conclude it poses no equal protection problem.

The tax does not run afoul of the due process clause either. The due process clause requires a minimal connection between interstate activities and the taxing state. It

also requires a rational relationship between the income attributable to the state and the intrastate values of the enterprise. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37, 63 L. Ed. 2d 510, 100 S. Ct. 1223 (1980). This tax, like its predecessor, meets these standards. *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, 323-26, 715 P.2d 123 (1986); *see also Tyler*, 483 U.S. at 251 (agreeing that the tax meets the nexus requirement).

The Supreme Court said that providing a credit for manufacturing taxes would cure the constitutional defect in Washington's B&O tax. The Legislature did this and more. The taxpayers concede that the State has remedied the internal consistency problem which the *Tyler* Court identified. The new tax law is constitutional.

III

The trial court found that the taxpayers were entitled to a refund for all taxes paid from June 23 to August 11, 1987 and ordered refunds of $2,769,978 plus penalties and interest. The government challenges this ruling. It argues that taxpayers have a right to the 2-way credit during this period, but have no right to a full refund.

We find that the 1987 and 1985 credit laws read together indicate that the Legislature intended the 2-way credit to apply to the taxes at issue here. Moreover, retroactive application of the law to the interim period does not violate the Washington State Constitution.

In 1985, the Legislature, apparently aware that the logic of the Supreme Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984) might doom Washington's multiple activities exemption, passed legislation designed to ameliorate the consequences of such an event. The 1985 credit law allowed Washington manufacturers to claim a credit for out-of-state gross receipts taxes on sales. Laws of 1985, ch. 190, § 1(4)(b). But the credit only applies if a court

finds the multiple activities exemption unconstitutional and finds relief appropriate. Laws of 1985, ch. 190, § 1 (4)(a). This law remedies the problems of discrimination of in-state manufacturers selling out of state, the problem before the *Tyler* Court. It provides no credits for out-of-state manufacturers paying a manufacturing tax at home and then paying a tax on sales in Washington.

The 1987 legislation cured this defect and continued the credit provided in the 1985 legislation. *See* House Journal, 50th Legislature (1987), at 2572; Senate Journal, 50th Legislature (1987), at 2682. But section 5 of the new law said it shall "take effect immediately." 1987 credit law, § 5. Because this occurred a month and a half after *Tyler*, taxpayers argue that no tax existed during the interim period.

Section 3 of the law shows that the Legislature intended to apply relief retroactively in the event of a court-ordered remedy notwithstanding the effective date of the act. It states:

> If it is determined by a court . . . that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to [the multiple activities exemption] as it existed before the effective date of this act, it is the intent of the legislature that the credits . . . shall be applied . . . and that relief . . . be limited to the granting of such credits.

1987 credit law, ch. 3, § 3. Given the holding of the *Tyler* Court, some relief is clearly appropriate. Our determination that some relief is appropriate triggers both the 1985 and 1987 legislation.

The taxpayers argue that because section 3 begins with the word if, the Legislature did not intend to have this law apply to the interim period. They persuaded the trial court that no tax existed in the interim period.

This is a poor statutory interpretation. The preamble refers to taxpayers who have conducted and will conduct

business in Washington. 1987 credit law, § 1. This suggests that the Legislature thought the law might be applied retroactively. Moreover, the preamble and legislative history leave no doubt that the law was intended to extend the 1985 "system of credits". *See* 1987 credit law, § 1; House Journal, 50th Legislature (1987), at 2752; Senate Journal, 50th Legislature (1987), at 2682.

Our case law fully supports extension of tax benefits to new classes of people when the Legislature intends this result.[4] In *Simpson v. State*, 26 Wn. App. 687, 615 P.2d 1297 (1980), the Court of Appeals found a statute providing a tax credit for cars purchased in other states unconstitutional. The court remedied the constitutional defect by extending the exemption to cover cars purchased in Canada.

It did so because striking down the unconstitutional exemption and severing it from the statute would have defeated the legislative purpose by denying the exemption to those the Legislature meant to benefit. *Simpson*, 26 Wn. App. at 695-96. Similarly, were we to strike down the "2-way credit" we would do violence to the legislative scheme by creating a double tax on intrastate businesses. *See Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 753-54, 278 P.2d 305 (1954) (legislative policy of B&O tax is to avoid double taxation).[5] Declaring the entire statute invalid would likewise defeat the Legislature's purpose.

The taxpayers have argued that interpreting the legislation to apply to this lawsuit raises constitutional difficulties. See Reply Brief of Appellants, at 14. We are not impressed with these difficulties.

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[4] We have, on the other hand, declined to extend exemptions or credits when the Legislature did not clearly intend such a result. *See, e.g., Associated Grocers, Inc. v. State*, 114 Wn.2d 182, —— P.2d —— (1990).

[5] The "2-way credit," like the multiple activities exemption it superseded, protects businesses from double taxation.

Taxpayers challenge the retroactive application of the credits on separation of powers grounds. State law governs the relationship between the Washington Legislature and its courts. Accordingly, our discussion rests entirely upon our independent opinion of the requirements of the Washington State Constitution. Taxpayers have cited no federal case supporting their position and we cite no federal cases in this discussion. We have cited federal law in other separation of powers cases, but only for purposes of guidance. Federal law does not compel the results reached in this case.

Taxpayers argue that the Legislature may not prescribe a remedy for a lawsuit. Taxpayers cite *Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975) to support this proposition. The *O'Brien* case does not stand for the proposition that the Legislature may not prescribe a remedy for a lawsuit. The *O'Brien* court struck a statute which interfered with a judicial determination of what constituted economic impossibility in a contract case. *O'Brien*, 85 Wn.2d at 272. The court therefore refused to enforce a legislative finding that contracts entered into prior to the legislation have become economically impossible to perform.

Our recent decision in *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 109 S. Ct. 35 (1988), controls this case. We wrote:

> A statute prescribing new rules to be applied to pending litigation is generally constitutional . . . Separation of powers principles are violated only when the Legislature infringes on a judicial function. . . .

109 Wn.2d at 143. A statute prescribing new rules to be applied to a pending lawsuit is especially appropriate in the context of tax litigation by a large group of litigants. Providing a remedy in this suit requires decisions on tax

policies. The Legislature should make these decisions. Applying the 1987 credit law retroactively, as well as prospectively, does not violate separation of powers.

The taxpayers argue that the legislation applied retroactively violates the state constitutional prohibition on special legislation. Const. art. 2, § 28. This argument is not correct. The legislation is not aimed only at this lawsuit. It applies prospectively as well as retroactively. It thus involves an open-ended classification, not special legislation. *See Metropolitan Seattle v. Seattle*, 57 Wn.2d 446, 451-52, 357 P.2d 863 (1960) (rejecting contention that law applicable to one drainage basin is special legislation). Taxpayers' argument that retroactive application violates equal protection principles has no support in their brief and no merit.

We hold that the taxpayers are entitled to a 2-way credit for taxes paid during the interim period. Full refunds are not appropriate. We reverse the trial court's holding in this respect.

We have found that the B&O tax as amended in 1987 is constitutional. Moreover, the 1987 credit law limits relief to the granting of credits. Accordingly, we affirm in part and reverse in part.

CALLOW, C.J., and BRACHTENBACH, DOLLIVER, DORE, ANDERSEN, DURHAM, SMITH, and GUY, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

No. 88-2-00680-3

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Plaintiffs,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,
Defendants.

[Filed July 21, 1989]

SUMMARY JUDGMENT

I. RECITALS

1.1 John T. Piper, James R. Johnston and G. Kim Risenmay of Bogle & Gates appeared for the plaintiffs. Kenneth O. Eikenberry, Attorney General, and Leland T. Johnson and William B. Collins, Assistant Attorneys General, appeared for defendants.

1.2 Three motions for partial summary judgment were heard in this case which, taken together, cover all the issues in this case. Hearings were held upon proper notice, it being agreed by the parties that there were no genuine issues of material fact and that the matters would be heard on motions for summary judgment.

* * * *

III. CONSTITUTIONALITY OF LAWS OF 1987 2ND EX. SESS., CH.3 (1987 CREDIT LAW)

This court having considered the record before it and the briefs and arguments of counsel, and in accordance

with this court's Oral Opinion rendered on June 29, 1989 concludes:

3.1 A hearing was held on June 29, 1989 on plaintiffs' and defendants' cross-motions for partial summary judgment regarding the constitutionality of Laws of 1987, 2nd ex. sess., ch. 3 (1987 credit law).

3.2 The 1987 credit law does not violate the Commerce Clause, Art. I, § 8 cl. 3 of the U.S. Constitution.

3.3 The 1987 credit law does not violate the Due Process Clause, Amendment XIV, § 1 of the U.S. Constitution.

3.4 The 1987 credit law does not violate the Equal Protection Clause, Amendment XIV, § 1 of the U.S. Constitution.

3.5 There is no genuine issue of material fact.

3.6 Defendants are entitled to summary judgment as a matter of law that the 1987 credit law does not violate the U.S. Constitution.

* * * *

VI. ORDER AND JUDGMENT

* * * *

6.2 Defendants' Motion for Partial Summary Judgment is granted with regard to the constitutionality of Laws of 1987, 2nd ex. sess., ch. 3, the 1987 credit law (¶¶ 3.1-3.6).

* * * *

6.2.2 Plaintiffs are not entitled to a refund for B&O taxes paid on their inter-State manufacturing, extracting and selling activities for the period beginning August 12, 1987.

* * * *

DATED this 21st day of July, 1989.

/s/ Paula Casey
PAULA CASEY
Judge

APPENDIX C

Exhibit 6 of Stipulation for Admission of Exhibits (Message to Members, Washington State Legislature, from House and Senate Majority and Minority Leaders)

[SEAL]

WASHINGTON STATE LEGISLATURE

Legislative Building • Olympia, Washington 98504

July 28, 1987

TO: Members, Washington State Legislature

FROM: Representative Joe King, Speaker
Representative Clyde Ballard, Minority Leader
Senator Larry Vognild, Majority Leader-Elect
Senator Jeannette Hayner, Republican Leader

SUBJ: Information Regarding Special Session

Please find enclosed an agreed upon packet of information regarding the proposed special session. The packet includes:

1. A summary and background memo on proposed legislative action in response to the B&O tax decision.
2. A memo regarding the court decision.
3. Three charts describing the incidence of B&O taxes on certain activities.
4. A bill analysis of the proposed two way credit, including a table on certain impacts.
5. The bill draft (H-3430) suggested to remedy the court case.

6. A bill draft (H-3423) suggested to remedy the veto regarding low-wage earner nursing home employees.

We are requesting the Governor to call a special session for 9:00 a.m., Monday, August 10, 1987. We anticipate a joint Ways and Means hearing in the House chambers shortly after convening. We would appreciate all members attending this meeting in order to expedite this session.

If you have any questions regarding this packet or the special session, please contact our offices.

July 24, 1987

TO: Legislative-Executive Committee on National Can Alternatives

FROM: Staff Work Group

SUBJECT: U.S. SUPREME COURT DECISION REGARDING B&O TAX

The purpose of this memo is to provide an overview of Washington's B&O tax structure and recent U.S. Supreme Court decision in *National Can Corp. v. Washington State Department of Revenue* [footnote omitted]. In brief, the court ruled that Washington's method of applying B&O tax to manufacturers is unconstitutional because it discriminates against interstate commerce. The decision concerns only B&O taxes paid by businesses which manufacture products in Washington and businesses which sell their manufactured products in Washington. The B&O tax is expected to provide $1.7 billion in the 1987-89 biennium. The maximum exposure from *National Can*, not including potential refunds for taxes paid before July 1, 1987, is a loss of $384 million or 22% of the total B&O tax.

* * * *

LEGISLATIVE OPTIONS

There are a number of possible legislative responses to the potential loss of revenue resulting from the decision. Some of those options are briefly discussed below. The question of refunds is not addressed below. As mentioned previously, there are differing potential refund amounts depending on the judicial or legislative response to the decision.

1. *No legislative action.* The Legislature could, of course, choose not to act while awaiting further judicial clarification. Since the ultimate result is uncertain, any of the fiscal impacts shown in the table on page 6 are possible.

2. *Expand the 1985 credit to include out-of-state manufacturers.* The legislature could follow the court's hint that unconstitutionality would be cured by "an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states" [footnote omitted]. Although this option was mentioned by the Court in its opinion, the Court did not formally rule on specific remedies. Thus, the Court's comments cannot be taken as final or exclusive approval.

   The Court seems to be suggesting something more than the 1985 credit would be required. The 1985 legislation allows credits against the manufacturing tax for selling tax paid to other states [Case Two taxpayers]. The 1985 credit legislation could be expanded to also allow credits against the selling tax for manufacturing tax paid to other states [Case Three taxpayers]. This would put in-state and out-of-state manufacturers in the same position of paying only selling tax when their manufactured products are sold in Washington.

   In 1987-89 this option would cost the state $42 million in lost revenue. Of this amount, $32 million would be for the credit for in-state manufacturers selling out-of-state and $10 million for out-of-state manufacturers selling in Washington.

3. *Repeal the multiple activities exemption.* The legislature could repeal the multiple activities exemption. This would end the discrimination against interstate commerce since all Washington manufacturers would pay manufacturing tax regardless of where the product was sold. Washington manufacturers selling in Washington would pay two taxes, a manufacturing tax and a selling tax.

   Under the current tax rates this option would result in an increase in state revenues of $60 mil-

lion. Revenue neutrality could be achieved by lowering the tax rate or increasing the B&O minimum activity exemption from the current $1,000 per month to some higher number. While these measures could reduce the tax increase for in-state manufacturer/sellers, on the whole they would still pay more tax and out-of-state manufacturers less tax.

4. *Apportion the B&O tax.* Under this option, the gross receipts of in-state and out of state companies would be "apportioned" between activity occurring in and outside of Washington. This technique is standard practice in states with corporate income taxes. Three factors (property owned, sales, and payrolls) are generally used to apportion tax liability.

   For example, an auto company with sales in Washington of $100 million (10% of its total sales of $1 billion) would currently pay taxes on the entire $100 million. With apportioning, if this firm had no facilities here, then the three factors would be 10% of sales, 0% for property owned, and 0% payroll in Washington for an average 3.3% apportioning factor. Thus, this firm would now pay taxes on $33.3 million (3.3% of $1 billion), rather than its current $100 million.

   Conversely a Washington airplane company with all of its payroll and property here that sells completely out of state would have an apportioning factor of 66.7% (the average of 100%, 100%, and 0%). So instead of having a tax base of $1 billion, the apportioned base would be $667 million.

   Finally, Washington firms that sell locally would have an apportioning factor of 100% so their taxable base would not change.

These three cases represent the extremes of where firms sell and are located. Most firms with a presence in Washington fall in between, with some facilities here even if most of their sales are elsewhere.

Without a change in tax rates, this option could mean a loss of as much as $200 million in the 1987-89 biennium. Those benefiting from apportionment would be out-of-state manufacturers selling in Washington. If tax rates were changed to achieve revenue neutrality, then there would be a shifting of taxes from out-of-state manufacturers to in-state manufacturers.

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

No. 88-2-00680-3

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Plaintiffs,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *et al.*,
Defendants.

STIPULATION OF FACTS AS TO
MULTIPLE ACTIVITIES CREDIT

The parties stipulate that the statements may be taken as fact for all purposes in this litigation:

1. In preparation for proposing the amendment to the multiple activities exemption (RCW 82.04.440) as adopted by the legislature at its August 10, 1987 session (Chapter 3, Laws of 1987 2d Ex. Sess.) the Washington Department of Revenue reviewed the taxes of other jurisdictions —foreign, state and local—to ascertain which taxes could qualify for the credits provided by the amendment which became law August 12, 1987.

2. By request dated January 14, 1988, these plaintiff taxpayers joined in submitting a request for a ruling from the Washington Department of Revenue, Interpretations & Appeals Division, in which they "identified taxes which we believe merit consideration by the Department as qualifying [for the Washington multiple activities credit]." A request was made "that the Department rule

as to whether these taxes will be recognized as qualifying." To facilitate the Department's review, copies of the pertinent provisions of the submitted taxing statutes were included with the request for ruling.

3. The Department has had these and other taxes under review. To date, no public ruling has been issued by the Department as to taxes of other jurisdictions that may qualify for the multiple activities credit.

In response to Interrogatories submitted by plaintiff taxpayers in this litigation, the Department has now identified certain qualifying taxes. These are described below. The Department is preparing to publish a ruling covering these same taxes. Presently the Department has inquiries pending to certain cities in West Virginia and South Carolina, for the purpose of obtaining copies of their tax ordinances which will also be considered for qualification. A complete list of the taxes that have been approved to date is as follows:

(a) TAXES OF OTHER STATES

Taxing Jurisdiction	Name of Tax	Code Reference	Included in Plaintiffs 1-14-88 Request
Delaware	Manufacturers License Taxes and Retail and Wholesale Merchants License Taxes	Del. Code Rev. §§ 2702(b), 2902(c), 2903(c), 2905(b) & (g)	
Hawaii	General Excise Tax	HI Rev. Stat. 237-13	X
Indiana	Gross Income	IN Code § 6-2.1-2-2	X
Oregon	Oil & Gax Tax	ORS 324.070	
Tennessee	Privilege & Excise -Soft drink manufacturers & bottlers -Utilities -Vending Machines	TN Code Ann. § 67-4-402(b), 67-4-405, 67-4-503(d)(1).	X
	Local Business Taxes (Retailers & Wholesalers)	TN Code Ann. § 67-4-708(1)(2)(3)(A)(4) & 67-4-709(b)(1)(2)(3)(4). NOTE: These taxes will not qualify if gross sales as defined in § 67-4-702(a)(6) are reduced by the deduction authorized in § 67-4-711(a)(5). The minimum tax in § 67-4-709(a) does not qualify.	

West Virginia	Severance Taxes	WV Code §§ 11-13A-3 & 11-13A-6. NOTE: Taxes will not qualify for credit if gross value as defined in § 11-13A-1(6) is reduced by the deductions in § 11-13A-1(6)(D) & (E).	
	Business & Occupation Tax NOTE: These taxes were repealed effective July 1, 1987.	WV Code §§ 11-13-2a, 11-13-2b & 11-13-2c	X

(b) LOCAL GOVERNMENT TAXES

Foley, AL	Business License Tax	§§ 3.2, 3.7(A)(C), 3.12 & 3.15	X
Montgomery, AL	Annual License	Lic. Ord. NO. 121-79 § 19C-12(2)(3)(4)	X
Anaheim, CA	Business License Tax	Anaheim Mun. Code 34.08.010	X
Fresno, CA	Business License Tax	Fresno Mun. Code § 5-302	X
Los Angeles, CA	Business Tax Ordinance	Los Angeles Mun. Code §§ 21.166 & 21.167	
Oakland, CA	Business Tax Ordinance	Oakland Mun. Code §§ 5.1.23, 5.1.26 & 5.1.34 NOTE: The taxes under § 5.1.34 will not qualify to the extent a deduction is taken for the value of raw materials or partially completed products under § 5.1.34(a).	X

Taxing Jurisdiction	Name of Tax	Code Reference	Included in Plaintiffs 1-14-88 Request
Sacramento, CA	Business Operations Tax	Sacramento City Code § 23.401	X
San Francisco, CA	SF Business Tax Ordinance	San Francisco Mun. Code §§ 1004.08 & 1004.13(a)	X
Santa Ana, CA	Business Tax License	Santa Ana Mun. Code § 21-71(1) & (3)	X
South Gate, CA	Gross Receipts License	South Gate Mun. Code §§ 2.08.305.8(12) & 2.08.305.10(4) & (8)	X
Atlanta, GA	B&O License & Fees	Atlanta City Code § 14-5001 NOTE: Tax calculated pursuant to § 14-5003(a)(1), (2) & (3) qualifies. However tax on employees calculated pursuant to § 14-5003(a)(4) & (5) does not qualify.	X
Hazelwood, MO	License Tax	Ordinance No. 883 (1/24/72) §§ 16-2 & 16-3	
Kansas City, MO	License Fee	Code of Gen. Ord. §§ 21.34 & 21.35	
North Kansas City, MO	License Tax	City Code §§ 13-17, 13-51 & 13-52	
St. Josephs, MO	License Fee	Code of St. Josephs §§ 1347 & 1348	
St. Louis, MO	License Fee	Rev. Code of Ord. §§ 8.54.030 & 8.56.130	

Philadelphia, PA	Business Privilege Tax	Philadelphia Code §§ 19-2603 & 19-2604(2)(b) NOTE: The tax measured by "net income" in § 19-2604(2)(b) does not qualify.	X
Pittsburgh, PA	Merchants License Fees and Tax	Code of Ordinances §§ 249.03.	
Mauldin, SC	Business License	Business & Professional License Ord. §§ 4 & 19	X
Richmond, VA	License Tax (Retailers)	Richmond Ord. § 28-420	X

(c) FOREIGN

Tax imposed by Canada upon gross amount of royalties received by Washington business imposed pursuant to Article XII of the tax treaty between the United States and Canada.

4. The following taxes have been expressly disapproved for credit:

(a) TAXES OF OTHER STATES

Taxing Jurisdiction	Name of Tax	Code Reference	Included in Plaintiffs 1-14-88 Request
Alaska	Fisheries Business Tax	AK Stat. § 43.75.015	X

Taxing Jurisdiction	Name of Tax	Code Reference	Included in Plaintiffs 1-14-88 Request
Delaware	Occupational Licenses and Fees (Service Providers)	DE Code Rev. § 2301	X
New Mexico	Gross Receipts Tax and Compensating Tax and Municipal Gross Receipts Taxes	NM Stat. Ann. §§ 7-9-4 and 7-19-4	X
Oregon	Severance Tax	OR Rev. Stat. § 321-425, 321-272 and 321-277	X
Tennessee	Privilege & Excise Taxes (Telephone & Telegraph Companies)	TN Code Ann. 67-4-407(a)	X

(b) LOCAL GOVERNMENT TAXES

Taxing Jurisdiction	Name of Tax	Code Reference	Included in Plaintiffs 1-14-88 Request
Birmingham, AL	Sales Tax	Ordinance No. 74-115	X
Pasadena, CA	License Tax	Ord. No. 4747 (effective 2/1/66)	X

Atlanta, GA	B&O Licenses & Fees	City Code § 14-5003(a)(4) & (5) NOTE: Tax measured by gross revenue in § 14-5001 and 14-5003(a)(1), (2) and (3) does qualify.	X
St. Louis, MO	Business License Tax	Code Chapter 8.06.300	X
Philadelphia, PA	Business Privileges Taxes	Code § 19-2604(2)(b) & 19-2604(4). NOTE: The tax measured by "annual receipts" in § 19-2604(2)(b) does qualify.	X
Richmond, VA	License Tax (Wholesalers)	Ord. §28-421.	X

5. The amounts of multiple activities credits listed below are all that were claimed on tax returns filed by interstate taxpayers for the months indicated.

June 1987	—	$ 17,185
July 1987	—	2,656
August 1987	—	79,196
September 1987	—	72,637
October 1987	—	34,397
November 1987	—	55,242
December 1987	—	153,995
January 1988	—	45,477
February 1988	—	26,046
March 1988	—	163,573
April 1988	—	138,222
May 1988		184,068
June 1988	—	55,171
July 1988	—	119,812
August 1988	—	5,797
September 1988	—	60,418
October 1988	—	90,081
TOTAL		$1,303,973

6. Based on the language of the multiple activities credit statute, the Department has limited the application of the multiple activities tax credit to gross receipts taxes paid in other jurisdictions which either are attributable to goods extracted or manufactured in other jurisdictions and sold in Washington or are attributable to goods sold in other jurisdictions that were manufactured or extracted in Washington. Thus, gross receipts taxes paid on goods manufactured in Oregon and sold in Hawaii do not qualify for multiple activities tax credits against Washington taxes. Accordingly, a business must trace its goods by keeping records where it extracts, manufactures or sells its products. A business must also keep records of the taxes it pays to other jurisdictions.

In an audit to determine whether a business has accurately traced its goods for purposes of the multiple

activities tax credit the Department has used test periods. In a test period the Department examines a specific period of time (e.g., two months) to determine the percentage of goods extracted or manufactured or sold in Washington that were also extracted or manufactured or sold in jurisdictions with qualifying gross receipts taxes. This percentage is then applied to the entire audit period. The details of the test period (e.g., copies of sales invoices and list of product numbers) are kept by the business. The use of test periods is a common auditing technique employed by the Department. The Department only employs test periods when these are representatives of the entire audit period and the business subject to the audit is in agreement.

7. Based on the language of the multiple activities tax credit the Department has limited the multiple activities tax credit to an amount not exceeding the amount which would have been allowed if the tax rate of a qualifying gross receipts tax in another jurisdiction were equal to the Washington tax rate against which the credit is claimed. For example, if the rate of a qualifying manufacturing gross receipts tax is .005, the Department will limit the application of the credit to .00484, the rate of the Washington selling tax against which the credit is applied. This will eliminate the Washington selling tax on that product. The excess rate of manufacturing gross receipts tax .00016 (.005-.00484=.00016) cannot be applied to reduce Washington tax on some other product.

8. The tax dollars claimed in the Taxpayer's Amended Complaint and in the Affidavits filed by the Taxpayers may be assumed correct for purposes of trial in this litigation. However, if the Taxpayers are entitled to a refund as a result of this litigation, the parties shall be entitled to verify the amount of the refund before it is made.

DATED this 19th day of May, 1989.

BOGLE & GATES

/s/ D. Michael Young
D. MICHAEL YOUNG
Attorneys for Plaintiffs

KENNETH D. EIKENBERRY
Attorney General

/s/ William B. Collins
WILLIAM B. COLLINS
Assistant Attorney General
Attorneys for Defendants

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

No. 88-2-00680-3

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Plaintiffs,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *et al.*,
Defendants.

STIPULATION OF FACTS AS TO PLAINTIFFS' BUSINESSES

The parties stipulate that the following statements may be taken as fact for all purposes in this litigation.

1. Plaintiffs (the Taxpayers) include businesses that produce products, by extracting and/or manufacturing, and sell those products. These businesses generally fall into the following three categories.

1.1 The businesses listed in Appendix A to this Stipulation produce products elsewhere and sell them in Washington. These businesses also produce products in Washington and sell them elsewhere. In addition, these businesses sell in Washington products produced in Washington. However, the tax on such intrastate transactions is not at issue in this case. An example of one of these combination businesses is American National Can Corporation.

1.1.1 American National Can Corporation (ANCC) is a Delaware corporation, having its principal office in Chicago, Illinois.

1.1.2 ANCC manufactures and sells packaging products. ANCC's products are sold throughout the world.

1.1.3 ANCC operates manufacturing facilities in 28 states, including Washington. ANCC maintains offices in 28 states, including Washington. ANCC employees approximately 17,200 people nationwide. Approximately 240 of ANCC's employees are in Washington.

1.1.4 In order to sell ANCC packaging products in Washington, ANCC maintains a sales office and employs seven sales and office personnel in Washington, whose activities contribute to the value of products so sold in this state. The cost of their activities is included in the price ANCC receives for these products.

1.1.5 In order to sell ANCC packaging products in Washington and elsewhere, ANCC maintains plants, offices, warehouses and other facilities in states other than Washington, including factory workers, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price ANCC receives for those products.

1.1.6 In order to manufacture ANCC products in Washington, ANCC maintains two plants and employs factory workers, engineers, office personnel and others in Washington, whose activities contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price ANCC receives for those products.

1.1.7 In order to sell its products outside Washington, (including the products it manufactures in Washington), ANCC maintains offices, warehouses, and other facilities in states other than Washington, and employs many people outside the State of Washington, including sales repre-

sentatives, engineers, scientists, laboratory technicians, accountants, lawyers, office personnel, warehouse personnel, industrial and public relations personnel, computer programmers, data processors, and other employees whose activities outside Washington contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price ANCC receives for those products.

1.2 The businesses listed in Appendix B to this Stipulation produce products elsewhere and sell them in Washington. An example of one of these out-of-state manufacturers is Xerox Corporation.

1.2.1 Xerox Corporation (Xerox) is a New York corporation, having its corporate office in Stamford, Connecticut.

1.2.2 Xerox manufactures and sells office equipment. Xerox products are sold throughout the world. None of this equipment is manufactured in Washington.

1.2.3 Xerox operates manufacturing facilities in New York, California and Oklahoma. Xerox maintains offices in 47 states, including Washington. Xerox employs approximately 55,000 people. Approximately 550 of Xerox's employees are in Washington.

1.2.4 In order to sell Xerox manufactured products in Washington, Xerox maintains sales offices, service offices and a product demonstration center in Washington, and employs sales representatives, services technicians, clerical/administrative personnel, and others in Washington, whose activities contribute to the value of products so sold in this state. The cost of their services is included in the price Xerox receives for those products.

1.2.5 In order to sell Xerox-manufactured products in Washington and elsewhere, Xerox employs many people outside the state of Washington, including factory workers, engineers, architects, scientists, laboratory techni-

cians, accountants, lawyers, office personnel, warehouse personnel, computer programmers, data processors, and other employees. Their activities outside Washington contribute to the value of the products that are sold in Washington. The cost of their activities is included in the price Xerox receives for those products.

1.2.6 Xerox operates regional distribution centers. Distribution centers may handle all office products or may handle specific types, e.g., copier/duplicating equipment, printers, typewriters, facsimile devices or computers. For example, Xerox duplicating equipment sold in Washington is distributed through the Santa Fe Springs, California, regional distribution center. Xerox facsimile and small-scale printer products sold in Washington are distributed through the Dallas, Texas, regional distribution center. Xerox office supplies sold in Washington are distributed through either the San Francisco or the Compton, California, distribution center. Xerox does not operate a distribution center in Washington.

1.2.7 Xerox's administrative functions are performed in regional headquarters. For example, Xerox sales representatives selling in Washington are responsible to a regional sales office in Walnut Creek, California. Xerox's West Coast tax operations are headquarted in Santa Ana, California. The Santa Ana office has responsibility for tax planning in 17 western states, including Washington. Credit collection policy, advertising and marketing strategy, and salesmen compensation plans are developed and administered at Xerox's Rochester, New York, office. Central administrative functions are not performed in Washington.

1.3 The businesses listed in Appendix C to this Stipulation produce products in Washington and sell them elsewhere. These businesses also sell in Washington products produced in Washington. However, the tax on such intrastate transactions is not at issue in this case. An example of one of these instate manufacturers is Kalama Chemical, Inc.

1.3.1 Kalama Chemical, Inc. (Kalama) is a Washington corporation, having its corporate office in Seattle, Washington.

1.3.2 Kalama manufactures and sells chemical products. Its products are sold primarily outside of Washington and in the export market.

1.3.3 Kalama operates manufacturing facilities in Kalama, Washington, and Garfield, New Jersey. Kalama maintains stocks of its goods (including those it manufactures in Washington) in Illinois, New Jersey, Indiana, and New York (as well as Washington).

1.3.4 Kalama employs a total of approximately 230 people. Approximately 135 of them are employed in Washington. Kalama's employees in Washington include management/administrative personnel, plant workers, engineers, office personnel and others, whose activities in Washington contribute to the value of products that are manufactured in this state. The cost of the activities is included in the price Kalama receives for those products.

1.3.5 In order to sell Washington-manufactured products outside Washington, Kalama employs sales representatives and others whose activities outside Washington contribute to the value of the products that are manufactured in Washington and sold outside this state. The cost of their activities is included in the price Kalama received for those products.

2. Defendant State of Washington, Department of Revenue (the Department) is an agency of the State of Washington charged with the responsibility of administering and collecting Washington's business and occupation tax imposed pursuant to chapter 82.04 RCW.

2.1 William R. Wilkerson is the duly appointed Director of the Department. As such, Mr. Wilkerson is the chief executive officer of the Department.

3. The Taxpayers do not contest in this action that there is nexus with Washington sufficient to support the imposition of Washington's business and occupation taxes.

DATED this 19th day of May, 1989.

BOGLE & GATES

/s/ D. Michael Young
D. MICHAEL YOUNG
Attorneys for Plaintiffs

KENNETH O. EIKENBERRY
Attorney General

/s/ William B. Collins
WILLIAM B. COLLINS
Assistant Attorney General
Attorney for Defendant

APPENDIX A

Hewlett-Packard Company
Geo. A. Hormel & Company
Tektronix, Inc.
Reynolds Metals Company
American National Can Company
American Cyanamid Company
Honeywell, Inc.
Longview Fibre
Cooper Industries, Inc.
General Electric Company
Golden Grain Macaroni Company, Inc.
Scott Paper Company
International Paper Company
ASC Pacific, Inc.

APPENDIX B

A.H. Robins Company, Inc.
Anheuser-Busch, Incorporated
Apple Computer, Inc.
Armstrong World Industries, Inc.
Bandag Incorporated
Bridgestone (U.S.A.), Inc.
Brown & Williamson Tobacco Corporation
Clark Equipment Company
The Coca-Cola Company
Colgate Palmolive Company
Cummins Engine Company
E.I. DuPont de Nemours & Co.
Eastman Kodak Company
Ford Motor Company
Gerber Products Company
Herman Miller, Inc.
Kimberly-Clark Corporation
Levi Strauss & Company
Lucas Western, Inc.
Mars, Incorporated
Uncle Ben's, Inc.
Kal Kan Foods, Inc.
Miller Brewing Company
Monsanto Company
The Okonite Company
Onan Corporation
Outboard Marine Corporation
Owens-Corning Fiberglas Corporation
Square D Company
Triangle Pacific Corp.
W.R. Grace & Co.
Remington Arms Co., Inc.
Xerox Corporation
Chrysler Motors Corporation
Shulton, Inc.
Mrs. Smith's Frozen Foods Company

McGraw-Edison Company (Halo Lighting Division)
McGraw-Edison Company (Bussman Division)
Edison International, Inc.
Cooper Power Systems, Inc.
The Mead Corporation
The Quaker Oats Company
Stokely-Van Camp, Inc.
Gaines Foods, Inc.
Continental Coffee Products, Inc.
Westinghouse Electric Corporation
Thomasville Furniture Industries, Inc.

APPENDIX C

Basic American Foods
Hygrade Food Products Corporation
Kalama Chemical Inc.
Murray Pacific Corporation
Quinton Instrument Company
Shields Bag and Printing Co.
Sun Sportswear, Inc.
U.S. Oil & Refining Co.
Welch Foods, Inc.
Noel Canning Corporation
Seattle FilmWorks, Inc.
Alaskan Copper Companies, Inc.
Alpac Corporation
Western Bottling Company, Inc.
Down River Forest Products, Inc.
E. M. Matson, Jr., Inc.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I:

Section 8. The Congress shall have Power . . .;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

* * * *

Revised Code of Washington (1989):

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

84.04.230 Tax upon extractors. Upon ever person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, extracted for sale or for commercial or industrial use, multiplied by the rate of forty-four one-hundredths of one percent;

The measure of the tax is the value of the products, including byproducts, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.240 Tax on manufacturers. Upon every person * * * engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of forty-four one-hundredths of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.250 Tax on retailers. Upon every person * * * engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

82.04.270 Tax on wholesalers, distributors. (1) Upon every person * * * engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

* * * *

82.04.440 Persons taxable on multiple activities —Credits. (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsections (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed

the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 * * * shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, * * * with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Wash-

ington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 * * * and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82-04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

82.04.500 Tax part of operating overhead. It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

Alaska Statutes (1983):

Sec. 43.55.011. Oil production tax. (a) There is levied upon the producer of oil a tax for all oil produced from each lease or property in the state, less any oil the ownership or right to which is exempt from taxation. The tax is equal to either the percentage-of-value amount calculated under (b) of this section or the cents-per-barrel amount calculated un-

der (c) of this section, whichever is greater, multiplied by the economic limit factor determined for the oil production of the lease or property under AS 43.55.013. If the amounts calculated under (b) and (c) of this section are equal, the amount calculated under (b) of this section shall be treated as if it were the greater for purposes of this section.

(b) The percentage-of-value amount equals * * * 15 percent of the gross value at the point of production of taxable oil produced from the lease or property after June 30, 1981; except that for a lease or property coming into commercial oil production after June 30, 1981, the percentage-of-value amount equals 12.25 percent of the gross value at the point of production of taxable oil produced from the lease or property in the first five years after the start of commercial oil production and equals 15 percent of the gross value at the point of production of taxable oil produced thereafter from the lease or property.

(c) The cents-per-barrel amount equals $0.60 per barrel of taxable old crude oil produced from the lease or property, and $0.80 per barrel for all other taxable oil produced from the lease or property, both as adjusted by AS 43.55.012.

Alaska Statutes (1989):

Sec. 43.55.900. Definitions. In this chapter

* * * *

(7) "gross value at the point of production" means

(A) for oil, the value of the oil at the point where it is metered or measured * * * in a condition of pipeline quality on the premises of the lease or property from which it is recovered; * * *

* * * *

Sec. 43.75.015. Fisheries business tax. (a) A person engaged in a fisheries business is liable for and

shall pay the tax levied by this section on the value of each of the following fisheries resources processed during the year at the rate set out after each:

* * * *

43.75.140 Definitions.

* * * *

(11) "value" means the actual price paid for the fisheries resource by the fisheries business, including indirect consideration such as fuel, supplies, or gear, whether paid at the time of purchase of the fisheries resource or tendered as a deferred or delayed payment, except that "value" means the market value of the fishery resource if the taking of the fishery resource is done in company-owned or company-subsidized boats operated by employees of the fisheries business or in boats which are operated under lease or other arrangement.

Michigan Compiled Laws (1989):

208.1 Short title.

Sec. 1. This act shall be known and may be cited as the "single business tax act".

208.3 Definitions; A, B.

Sec. 3. * * *

(2) "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object or gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, * * *

* * * *

208.31 Specific tax on adjusted tax base; * * * tax imposed on privilege of doing business; * * *

Sec. 31. (1) There is hereby levied and imposed a specific tax of 2.35% upon the adjusted tax base of every person with business activity in this state which is allocated or apportioned to this state.

* * * *

(3) The tax so levied and imposed is upon the privilege of doing business and not upon income.

* * * *

Oregon Revised Statutes (1989):

317.005 Short title. This chapter may be cited as the Corporation Excise Tax Law of 1929.

317.010 Definitions. * * *

* * * *

(5) "Excise tax" means a tax measured by or according to net income imposed upon * * * manufacturing and business corporations for the privilege of carrying on or doing business in this state.

* * * *

317.061 Tax rate. The rate of the tax imposed by and computed under this chapter is six and six-tenths percent.

317.070 Tax on * * *, manufacturing and business corporations. Every * * * manufacturing and business corporation doing or authorized to do business within this state, * * * shall annually pay to this state, for the privilege of carrying on or doing business by it within this state, an excise tax according to or measured by its Oregon taxable income, to be computed in the manner provided by this chapter, at the rates provided in ORS 317.061.

APPENDIX G

Parties to the Proceedings and Designation of Corporate Relationships

PETITIONER:

A.H. Robins Company, Incorporated

PARENT:

American Home Products

SUBSIDIARIES:

Lee Laboratories, Inc.
Trimark Corporation

PETITIONER:

Alaskan Copper Companies, Inc.

PARENTS:

None

SUBSIDIARY:

Leschi Boat Service (inactive)

PETITIONER:

Alpac Corporation

PARENTS:

Frito-Lay, Inc.
Alpac Investments, Inc.
MBA Portland Co.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

American Cyanamid Company

PARENTS:

American Cyanamid Company stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Cyanamid Iberia, S.A.
Cyanamid India, Ltd.
Cyanamid Italia S.p.A.
Cyanamid Fothergill Ltd.
CYRO Industries
B. Braun-Dexon G.m.b.H.
Cyanamid Taiwan Corp.
TDF Tiofine B.V.
Mitsui-Cyanamid Ltd.
Lederle (Japan) Ltd.
Societe Des Sutures
Chirurgicales Robert &
Carriere-Lederle
Applied Solar Energy Corporation
Arizona Chemical Company
B. Braun-Dexon G.m.b.H.
B. Braun-Dexon (Portugal) Produtos
Hospitalares Limitada
B. Braun-Dixon, S.A.
Cyanamid Chile Limitada
Cyanamid Chimica Italiana S.r.l.
Cyanamid Iberica, S.A.
Cyanamid India Limited
Cyanamid Investments of Australia Ltd.
Cyanamid Investimentos Ltds. (Cyvest)
Cyanamid-Ketjen Katalysator B.V.
Cyanamid (Pakistan) Limited
Cyanamid (Portugal) Limitada
Cyanamid Quimica do Brasil Ltda.
Cyanamid Taiwan Corporation
Laboratories Lederle S.A.
Lederle (Japan), Ltd.

Lederle (Nigeria) Limited
Mitsui-Cyanamid, Ltd.
Societe des Sutures Chirurgicales
Robert et Carriere-Lederle
South African Cyanamid (Proprietary)
Limited
Sutumex, S.A. de C.V.
TDG Tiofine B.V.
Titanium Enterprises
YuHan-Cyanamid, Inc.

PETITIONER:

American National Can Company
f/k/a National Can Corporation

PARENT:

Pechiney SA

SUBSIDIARIES:

Pechiney International
Lamitec Verpackungstechnologien GmbH
Nacanco Paketleme Sanayi Ve Ticaret AS
National Can Italiana, SPA
Minmental
Tubopak
Aluminium de Grece
Carbone Holdings
Carbone-Lorraine Australia
Carbone-Lorraine Corporation
Carbone-Lorraine Industries Corporation
Carbone-Lorraine Nederland NV
Carbone-Lorraine S.A.I.C.
Carbone-Lorraine
Carbonio
Carbono Lorena
Cefilac of American
Deutsche Carbone AG

Ferraz
Gesellschaft fur Trenntechnik
Sociedad Fabricacion Carbones Elec
Svenska le Carbone A/B
Eurocel
Cegram
Cerca
Ste Cogema, Framatome et Uranium Pechiney
Compagnie Generale d Electrolyse du Palais
Comurhex
Franco Belge de Fabrication de Combustibles
Franco Belge de Fabrication de Combustibles International
Genosa
Hidro-Nitro
Zircotube

PETITIONER:

Anheuser-Busch, Incorporated

PARENT:

Anheuser-Busch Companies, Inc.

SUBSIDIARIES:

None (except wholly owned)-

PETITIONER:

Apple Computer, Inc.

PARENTS:

Apple Computer, Inc. stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Merus Corporation
Touch Commuincations, Inc.
SyBase, Inc.
Photonics Corp.
Spectra, Inc.
Apple de Mexico
Echelon Systems (ACM)
Digital F/X Inc.
Netframe Systems, Inc.
Master Plan Software, Inc.
Claris Corp.

PETITIONER:

Armstrong World Industries, Inc.

PARENTS:

Armstrong World Industries, Inc. stock is traded on the New York, Philadelphia, and Pacific Stock Exchanges. The only corporation owning 5% or more of Petitioner's stock is First City Financial Corporation of Vancouver, Canada.

SUBSIDIARIES:

Armstrong/Pat Davie Ltd.
Armstrong ABC Trading
Inarco Limited
Armstrong-Nylex Pty. Ltd.
Bega, Inc.

PETITIONER:

ASC Pacific, Inc.

PARENT:

BHP Holdings (USA) Inc. (Wholly owned by Broken Hill Proprietary Company, Ltd., an Australian corporation.)

SUBSIDIARIES:

None

PETITIONER:

Bandag Incorporated

PARENT:

Bandag Incorporated stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Basic American Foods, Inc. a/k/a AMPCO Foods, Inc.

PARENTS:

No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None

PETITIONER:

Bethlehem Steel Corporation

PARENTS:

Bethlehem Steel Corporation stock is publicy traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Hibbing Taconite Company
Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.
G&A Limited Partnership III-A
Griffin-Alexander International, Inc.

India Offshore Inc.
Iron Ore Company of Canada
Presque Isle Corporation
Restauradora de las Minas de Catorce, S.A. de C.V.
Seadrill, Inc.
Thailand Offshore Joint Venture
Walbridge Coatings, an Illinois Partnership
Rig VI Limited Partnership
Ontario Iron Company
Rig V Limited Partnership
Bethlehem Singapore Private Limited
Iron Ore Land Company
Northern Land Company, Limited
Schefferville Power Company
Twin Falls Power Corporation Limited
Mineracoes Brasileiras Reunidas-MBR

PETITIONER:

Bridgestone/Firestone Inc. (formerly Bridgestone (U.S.A.) Inc.)

PARENT:

Bridgestone Corporation

SUBSIDIARIES:

None

PETITIONER:

Brown & Williamson Tobacco Co.

PARENTS:

B.A.T. Industries p.l.c.
Southwestern Nominees, p.l.c.
BATUS Tobacco Services, Inc.
B.A.T. Holdings, Inc.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Chrysler Motors Corporation

PARENTS:

Chrysler Motors Corporation stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

(Other than dealer corporations)
Diamond Star Motors Corporation
Mitsubishi Motor Corporation
Officine Alfieri Maserati, S.p.A.

PETITIONER:

Clark Equipment Company

PARENTS:

Clark Equipment Company stock is traded on the New York Stock Exchange. The only entities owning 5% or more of Petitioner are:

Clark Equipment Company Leveraged Employee Stock Ownership Plan
United Banks of Colorado, Inc.
United Bank of Denver

SUBSIDIARIES:

None

PETITIONER:

Coca-Cola Company (The)

PARENTS:

None

SUBSIDIARIES:

The Coca-Cola Bottling Co. of New York, Inc.
Apple Advertising Corporation
KNY Inc.
Sodasystems Inc.
Coca-Cola Amatil Limited
Beverage Haulage Ltd.
Pacific Secure Systems Pty. Ltd.
Complejo Industrial PET S.A.
INTI S.A. Industrial y Comercial
Getraenkeproduktionsgemeinschaft Ges.m.b.h
Getraenkeproduktionsgemeinschaft Ges.m.b.h
U. Co. KG
P.T. Coca-Cola Indonesia
Nairobi Bottlers Limited
Ansan Ankara Gida Mesrubat ve Meyva Sulari
Sanayii ve Ticaret A.S.
Meda Mesrubat Dagitim ve Ticaret A.S.
Montevideo Refrescos, S.A.
Brucephil, Inc.
The Philadelphia Coca-Cola Bottling Co.
Coca-Cola Bottling Company Consolidated
Coca-Cola Enterprises Inc.
Johnston Coca-Cola Bottling Group, Inc.
Central States Coca-Cola Bottling Company
Johnston Mid-West Coca-Cola Bottling Company
Johnston Coca-Cola Bottling Company
The Coca-Cola Bottling Company of St. Louis
Belbottling
Belcanning
S.A. Sobrumo
Socodrink
Exporlima Agricola Ltda.
Exporlima Industria e Comercio Ltda.
Macsol S.A.-Manufactura De Cafe Soluvel
Grandale Inc.
T.C.C. Beverages Ltd.
(d/b/a/ Coca-Cola Beverages)
Canada Dry Bottling Company Ltd.

Hainan Beverage and Food Co. Ltd.
Tianjin Jin-Mei Beverage Company Limited
International Aerated Water Company
Fako-Getraenke G.m.b.H.
Getrankeindustrie Main Taunus G.m.b.H. & Co K.G. (Inactive)
Getrankeindustrie Main Taunus G.m.b.H. and Co. Produktions and Vertriebs KG
PET Recycling Deutschland G.m.b.H.
Industria de Cafe S.A.
Alimentos y Bebidas Atlantida, S.A.
Productos Alimenticios Sharp S.A.
Productos Alimenticios Incasa Ltd.
Industria de Cafe S.A. y Compania Ltda.
Coca-Cola Swire Beverages Ltd.
BC Development Company, Ltd.
Swire Bottlers Ltd.
PT Djaya Beverages Bottling Company
Sorabol Food Company, Ltd.
Embopartes, S.A. de C.V.
SPLAN S.A. de C.V.
Concem, S.A. de C.V.
Nederlandse Coca-Cola Bottlemaatschappij B.V.
Coca-Cola Bottlers Philippines, Inc.
Aguas Minero Medicinales, S.A. (AMIMESA)
Taiwan Bottling Co., Ltd.
Thai Pure Drinks Limited
Amalgamated Beverages Great Britain Limited
Cantrell and Cochrane (G.B.) Limited (Inactive)
Cantrell and Cochrane (Northern) Ltd. (Inactive)
Cantrell and Cochrane (Southern) Ltd. (Inactive)
S.D. Collections Limited
Coca-Cola & Schweppes Beverage Ltd.
Eastern Bottlers Limited
Riberena, S.A.
Codial
Guangmei Foods Co. Ltd.
Coca-Cola Deutschland Verkauf G.m.b.H. & Co.

Fabbrica Padana Imbottigliamento Bevande Gassate—FAPIB S.p.a.
Societa Umbro Laziale Imbottigliamento Bevande Sulib S.r.l.
Cleethorpes Thirty-Two Ltd.
Oasis Industries Limited
Coca-Cola Distributors Limited (Inactive)
Sunbelt Coca-Cola Bottling Company, Inc.
Rutgers Minority Investment Company
Dallas Minority Enterprise Small Business Investment Corporation
Albev Trading, Inc.
China Ventures, L.P.
Cervejaria Brasil Norte S.A.
Cervejaria Kaiser Minas S.A.
Transportadora Kaiser Minas S.A.
Cervejaria Kaiser Rio de Janeiro S.A.
Cervejaaria Kaiser Sao Paulo S.A.
Transportadora Tibirica Ltda.
Tork Assessoria em Promocoes e Publicidade Ltda.
Companhia Sul Brasil de Cervejas
Transportodora Resiak Ltda.
C.P. Assessoria em Promocoes e Publicidade Ltda.
Kaiser S.A. Cervejas
Omega-Assessoria em Promocoes e Publicidade Ltda.
Refrescos do Brasil S.A.
Refrigerantes de Campinas S.A.
Transcasa Transportes Campinas S.A.
Spal Industria Brasileira de Bebidas S.A.
Spal Industrial Exportadora Ltda.
Spal Administrador e Comercial Ltda.
Transportadora Momentum S.A.
Transportadora Aratu Ltda.
Transportadora Oesta Ltda.
Transportadora Omega Ltda.
Transportadora Viviano Ltda.
Friomix S. A.
Industrias Roman, S.A.
Ramses Agricultural Company

Faktum G.m.b.H. (Inactive)
Getrankeindustrie Rhein-Hessen G.m.b.H. and Co. (KG) (Inactive)
Kurt Schiel Getrankevertrieb G.m.b.H. & Co. KG
West-Zentra Erfrischungsgetraenke G.m.b.H. & Co. (Inactive)
West-Zentra Erfrischungsgetraenke G.m.b.H. & Co. KG
Societe de Boissons non Alcolisees de Guinea (BONAGUI)
S.A.M.IM. S.r.l.—Societa Acquisti Mobiliari Ed Immobiliari
Canteen (Japan) Company Limited
Benesale Land, Inc.
Royal Swaziland Sugar Corp. Limited (RSSC)
Delisca AG
Hielogas, S.A.
Tapas S.A.
Grupo Continental S.A.
Albev Trading AG
Colonia Refrescos S.A. (Inactive)

PETITIONER:

Colgate Palmolive Company

PARENT:

No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

American Medical Consortium, Inc.
Colgate Palmolive del Ecuador, S.A.
Colgate Palmolive (Egypt) S.A.E.
Colgate Palmolive GmbH
Colgate Palmolive (India) Limited
Colgate Palmolive (Malaysia) Sdn. Bhd.
Hao Lai Chemical Co. Ltd.
Hawley & Hazel Company (Ltd.)
Hawley & Hazel (Taiwan) Corp.

Institutional Financing Services Inc.
Sheng Feng Industrial Co. Ltd.
Baser Kimya Sanaryii Ve Ticaret Anonim Sirketi
Baser Terketion Pazarliama Ve Ticaret Anonim Sirketi
Colgate Palmolive Arabia Ltd.
National Detergents Ltd.
St. Thomas Creations

PETITIONER:

Continental Coffee Products, Inc.

PARENT:

The Quaker Oats Company

SUBSIDIARIES:

None

PETITIONER:

Cooper Industries, Inc.

PARENTS:

None

SUBSIDIARIES:

C. Y. Lin Trading Company
Cameron Venezolona, S.A.
Cameron Iron Works (Nigeria) Ltd.

PETITIONER:

Cooper Power Systems, Inc.

PARENTS:

Cooper PAC Corporation
Cooper CPS Corporation
Cooper Industries, Inc.

SUBSIDIARIES:

None

PETITIONER:

Cummins Engine Company, Inc.

PARENTS:

Cummins Engine Company stock is traded on the New York Stock Exchange.

SUBSIDIARIES:

Consolidated Diesel Company
Cummins Nordeste, S.A.
Dampers Iberica S.A.
Energy Technologies, Inc.
Hyperbar USA
Kirloskar-Cummins Limited
Onan Corporation
Adept Technologies, Inc.
Williams Equine Products, Inc.
J.A. Faguy & Sons, Ltd.
Aries Technology, Inc.
Autofield Engines Private Limited
Consolidated Diesel, Incorporated
(formerly C.D.C. Financial Corporation)
Consolidated Diesel of North Carolina, Inc.
Cumzim (Private) Limited
Dampers S.A.
Energy Adaptive Grinding
Ferrotec, Inc.
Fleetguard Filtration Systems India Pte Ltd
Lubricant Consultants, Inc.
Motis Systems Products, Inc.
Onan-Cummins Power of California, Inc.
Techniparts A.A.
Vectron, Inc.
Cummins Power Company
Cummins Research Limited Partnership
Park Avenue Limited Partnership

PETITIONER:

Down River Forest Products, Inc. of Washington

PARENTS:

Down River International, Inc.
Greif Bros. Construction

SUBSIDIARIES:

None

PETITIONER:

E.I. du Pont de Nemours and Company

PARENTS:

The Seagram Company, Ltd., through its wholly owned subsidiary companies, owns approximately 23% of E.I. du Pont de Nemours and Company common stock.

SUBSIDIARIES:

Du Pont Canada Inc.
Andronics
Du Pont Farmaceutica Ltda
Du Pont—Idemitsu Co., Ltd.
Du Pont Lanxide Composites Inc.
Du Pont—MGC Co., Ltd.
Du Pont—MRC Company, Ltd.
Du Pont—Mitsui Fluorochemicals Company, Ltd.
Du Pont—Mitsui Polychemicals Company Ltd.
Mitsui Nisseki Polymers Co., Ltd.
Du Pont—Norol Maintenance Services A.S.
Du Pont—Sankyo Pharmaceuticals Co., Ltd.
Du Pont—Showa Denko Co., Ltd.
Du Pont—Toray Company, Ltd.
DUSA Endustriyel Iplik Sanayi Ve Ticaret A.S.
IDAC Automobillacke Verwaltungs GmbH
SeparaSystems, Inc.
Biotech Research Laboratories, Inc.
Cine Film Systems
DNA Plant Technology Corporation
FreshWorld, Inc.
Du Pont—TOA Co., Ltd.

Gemeinnutzige Wohnungsbau GmbH
Greyhawk Systems, Inc.
Haemonetics Corporation
HEM Research, Inc.
ImagiTex Incorporation
Ingenieurgesellschaft Fur
Agragtetechnik und Verkehrsfahrzenge Gmbh
KDK Automotive Coatings Company, Ltd.
La Domincia, S.A. de C.V.
Lanxide Armor Company
Laserscope Corporation
Molecular Biosystems Inc.
Newbridge Networds Corporation
Nylon de Mexico, S.A.
Perceptive Systems Incorporated
P.T. Peroxida Indonesia Pratama
POC Research Corporation
Quimca Fluor, S.A. de C.V.
Reactivos Minerales Mexicanos S.A. de C.V.
Supply Chain Software, N.V.
Tetraetilo de Mexico, S.A. de C.V.
Thapar-Du Pont Limited
Thapar Du Pont Spandex Ltd.
TVS Du Pont Electronics Ltd.
Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation
Conch International Methane Ltd.
Du Pont Scandinavia AB
AB Branslecentralen
ARA AB
ARA Bolagen AB
ARA Fotogenservice AB
ARA Gavle AB
ARA Jonkoping AB
ARA Norrkoping AB
Conara AB
Jet Trading AB
Maxi Bensin AB
Svenska Petroleumlagring

Svenska Kol ARA AB
Varmecenter Sven Meijer AB
OK/Co-Op
ACE Limited
Conoco South Umbarka (Egypt) Ltd.
Conoco Spain Ltd.
EXEL Limited
Conoco Bir El Nuss Ltd.
Conoco Buton (Indonesia) Ltd.
Conoco Cegonha (Angola) Ltd.
Conoco Dabaa Ltd.
Khalda Petroleum Co.
Conoco Faghur Ltd.
Suedbitumen GmbH
Conoco North Ras Quattara Ltd.
Conoco North Sitra Ltd.
K/S Statfjord Transport A.S. & Co.
Statfjord Transport A.S.
Colonial Pipeline Company
Explorer Pipeline Company
Lake Charles Pipe Line Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Yellowstone Pipe Line Company
Conoco Warim Ltd.
Conoco West Ras Qattara Ltd.
Oasis Oil Co. of Libya, Inc.
Felix Oil Company
Jupiter Chemicals Inc.
Kettleman North Dome Association
Oberrheinische Mineraloelwerke GmbH
Petco Enterprises Ltd.
Petrocokes, Ltd.
Petroleum Terminals, Inc.
Iricon Agency, Ltd.
The Standard Shale Products Company
Tidelands Royalty Trust
Du Pont Pixel Systems, Ltd.

IDAC U.K. Ltd.
Statfjord Transport A.S.
Associated Petroleum Terminals Ltd.
Benzene Marketing Co. Ltd.
BT&D Technologies
Cliffe Storage Ltd.
Crude Oil Terminals (Humber) Ltd.
Du Pont Fuji Electronic Imaging Ltd.
Humber Oil Terminals Trustee Ltd.
Petroleum Storage Ltd.
Warwickshire Oil Storage Ltd.
Tongue River Holdings, Inc.
Ameropa Coal Trading and Shipping, Inc.
Cardinal River Coals, Ltd.
Neptune Bulk Terminals (Canada) Ltd.

PETITIONER:

Eastman Kodak Company

PARENTS:

Eastman Kodak Company stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

City Photo Limited
Consumer Developments Ltd.
Dainichiseika-Sterling Co. Ltd.
Inrock Chemical Co., Ltd.
K.K. Big Color Service
K.K. Eiko Photo
K.K. Nihonbashi Pro Color
K.K. Tokyo Color Chiba Lab.
K.K. Tokyo Color Shizuoka Lab.
K.K. Yokohama Lab.
Kasei Verbatim Kabushiki Kaisha
Kodak Japan Ltd. (formerly Kodak Nagase K.K.)
Kodak Nagase Medical K.K.
Mackwoods-Winthrop Ltd.

Miller Bros. Hall & Company Limited
P.T. Sterling Products Indonesia
Photo Finishers (Glasglow) Limited
Quick Processing Industries (UK) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug Korea Ltd.
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Protuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Stuart Photo Services Limited
Taylors Developing & Printing Works Limited
Verbatim Comercial Ltda.

PETITIONER:

Edison International, Inc. was dissolved on December 31, 1987, into its sole parent corporation, Cooper Industries, Inc.

PETITIONER:

Ford Motor Company

PARENTS:

Ford Motor Company stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

The subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealer-operators of Ford products) are:

Ford Motor Company of Canada, Limited
Ford-Werke, A.G.

Ford Motor Company (Belgium) N.V.
Ford Motor Company A/S
O/Y Ford A/B
Ford Motor Company Aktiebolag
Ford Nederland B.V.
Eveleth Taconite Company
Ford Lio Ho Motor Company Ltd.
Renaissance Center Partnership
Fairlane Woods Association (a partnership)
First Nationwide Network, Inc.
Park Ridge Corporation
Ford Motor Company Limited
Ford Motor Credit Company Limited
Henry Ford & Son (Finance) Limited
Ford Credit Bank AG
Ensite Limited
Ford Motor Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford France S.A.
Ford Credit N.V.
Ford Italiana S.p.A.
Ford Credit S.p.A.
Ford Leasing S.p.A.
Ford Credit A/S
Ford Motor Compay S.A. de C.V.
Ford Credit B.V.
Ford Leasing S.A.
Ford Credit S.A.
Transcon Insurance Limited
Holdings, Inc.

PETITIONER:

Gaines Foods, Inc.

PARENT:

The Quaker Oats Company

SUBSIDIARIES:

None

PETITIONER:

General Electric Company

PARENTS:

General Electric Company stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

American General Electric (Nigeria) Ltd.
Electromat S.A.
GE Lighting Korea Company, Ltd.
GE/Fuji Electric Ltd Joint Venture—Mideast
General Electric Information Services S.p.A.
General Electric Philippines Meter and Instrument Co., Inc.
General Electric Turk Anonim Sirketi
Iran Electrical and Mechanical Services Company (Inactive)
Middle East Engineering Limited Saudi Arabia
Quarzglas GmbH
Springer Mining Company
Westdeutsche Quarzschmelze Beteiligungs GmbH
Yokogawa Medical Systems, Ltd.
Osram Argentina Sociedad Anonima Comercial e Industrial
Medidores Argentinos, S.A.
STL Corporation
The China Car and Foundry Company Limited (In Liquidation)
CFM International, S.A.
Fabrications Mecaniques de l'Atlantique S.A.
Prodis, S.A.
Hellenic Business Development and Investment Company, S.A.
Elpro International Limited
IGE (India) Limited
Turbomotori Internazionale S.p.A.

Asahi Diamond Industrial Company, Limited
C&C International, Ltd.
Eye Lighting Systems Corporation
GE Plastics Japan, Ltd.
GEM Polymers Ltd.
Information Services International-Dentsu, Ltd.
Japan Nuclear Fuel Company, Limited
SP Pacific, Ltd.
Toshiba Electronic Systems Co. Ltd.
Toshiba Silicone Company, Ltd.
Ube Cycon, Ltd
General Electric (Kenya) Ltd. (Inactive)
Dongyang Silicone Co., Ltd.
GP Lighting Company, Ltd.
Kolon Electromaterials Co., Ltd.
Korean Industrial Motor Company, Ltd.
Samsung Medical Systems
GE Fanuc Automation Europe S.A.
Brelec, S.A. de C.V.
Enseres Electroindustriales, S.A. de C.V.
General de Radio, S.A. de C.V.
Medidores Electromecanicos, S.A. de C.V.
Organizacion Mabe, S.A. de C.V.
Tragesa, S.A. de C.V.
Ultrapol, S.A. de C.V.
IGE of Nigeria Ltd.
A/S. Medirad
JAMJOOM Electrical Distribution Assemblies Company, Ltd.
GETAC Corporation
Taian Electric Manufacturing Company
United Asia Electric Company
General Domestic Appliances
Autopolymer Design, Inc.
Azdel, Inc.
BG Automotive Motors
CBI Nuclear Company
CFM International, Inc.

Coherent General, Inc.
Composite Material Characterization, Inc.
Cos Mar, Inc.
Engine Parts International, Inc.
Ericsson-GE Holding Inc.
GE Toshiba Lighting Corp.
Geismar Inc
Genasystems, Inc.
General Electric Mobile Communications Distribution Inc.
General Electric Radio Services Corporation
General Plasma Midwest, Inc.
High Voltage Breakers, Inc.
Huntsman
Information Alliance Co., Inc.
Kawasaki Thermal Systems
LMX Corporation
Locke Insulators, Inc.
Marquette Electronics, Inc.
Medical Ventures, Inc.
Mint-Pac Technologies, Inc.
Movid Information Technology Inc.
Otisca Industries, Limited
Racom Corporation
Star Technologies, Inc.
Vicom Systems, Inc.
Indunor S.A.
Manufacturera de Aparatos Domesticos S.A.
Venezolana de Compresores y Motores S.A.
Vidriolux, C.A.

PETITIONER:

Geo. A. Hormel and Company

PARENTS:

None

SUBSIDIARIES:

None (except wholly ~~owned~~)

PETITIONER:

Gerber Food Products Company

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

Golden Grain Macaroni Co.

PARENT:

The Quaker Oats Company

SUBSIDIARIES:

None

PETITIONER:

Herman Miller, Inc.

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

Hewlett-Packard Company

PARENTS:

None

SUBSIDIARIES:

Yokogama—Hewlett-Packard Ltd
Samsung Hewlett-Packard Limited
China Hewlett-Packard
Microelectronics Technology, Inc.
Hewlett-Packard FPB Ltd.

National Micro Systems Corporation
Octel Communications Corporation
Hilco Technologies, Inc.
Manufacturing and Consulting Services, Inc.
Microelectronics and Computer Technology Corp.
Vectec Corporation
Biotechnology Research and Development Corporation
Conductus, Inc.
Forum Systems
3Com Corporation
Sequoia Systems, Inc.
Natural MicroSystems Corporation
Gateway Systems Corporation
Spatial Technology, Inc.

PETITIONER:

Honeywell Inc.

PARENTS:

Honeywell Inc. stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Icotron
Honeywell DO Brasil & CIA.
Honeywell-Sharecom Houston
Alliance Development Corp.
Alphasil, Inc.
Information Storage Inc.
Saudi Arabian Tetra Tech Limited
Honeywell IPC G.m.b.H. and Co., KG.
Bull HN Information Systems Inc.
Bull HN Information Systems Wholesale Pty.
Bull HN Sistemas De Informacion S.A. DE C.V.
Mexicana Industrial Honeywell, S.A. DE C.V.
Compuprint Bull S.A.

Societa Internazionale Di Sistemi Standard XS S.p.A.
Sinport-Sinergie Portuali S.r.l.
Auditor S.p.A.
Societa Italiana Servizi Tecnici Ed Organizzativi
Societa Iniziative Commerciali Industriali E Techniche
Sviluppo Informatica Sistemi Aziendali
Societa Italiana Computer Aided Design
Line Informatica S.r.l.
Sterch Controls
Honeywell Europe S.A.
Embrasid S.A.
Systematics
Honeywell India Limited
Tata Honeywell Limited
Sinted S.p.A.
Yamatake-Honeywell Co., Ltd.
Yamatake & Co., Ltd.
Taishin Co., Ltd.
Yabatake Engineering Service
Goldstar-Honeywell Company, Ltd.
NEC Honeywell Space Systems
Berkat Honeywell SDN. BHD.
Tecnologia Y Automatizacion Honeywell
Honeywell B.V.
Honeywell Kuwait K.S.C.
Honeywell AG
Dienes-Honeywell G.m.b.H.
FEG Gesellschaft FUR Logistik
Arbeitsmedizinische Betreuungsgesellschaft Kieler Betriebe m.b.H.
Geomar Technologie G.m.b.H.
Honeywell Turki-Arabia Ltd.

PETITIONER:

Hygrade Food Products Corporation

PARENTS:

Sara Lee Holding Company
Sara Lee Corporation

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

International Paper Company

PARENTS:

International Paper Company is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner.

SUBSIDIARIES:

Arizona Chemical Company
Envases Internacional S.A.
Haig Point/Melrose Waste Treatment Company, Inc.
Impresora del Yaque
International Paper Italia, S.p.A.
International Paper Korea Ltd.
IPI Corporation
Masonite (Africa) Ltd.
Productora De Papeles, S.A.
Rengo International Products Company, Limited
Societe Mediterraneenne, d'Emballages
Winthrop, Limited

PETITIONER:

Kalama Chemical Inc.

PARENT:

BC Sugar Refinery, Ltd.

SUBSIDIARY:

Pelican Trading Co., Ltd.—Barbados

PETITIONER:

Kal Kan Foods, Inc.

PARENT:

Mars, Incorporated

SUBSIDIARY:

None

PETITIONER:

Kellogg Sales Company

PARENT:

Kellogg Company

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Kimberly-Clark Corporation

PARENTS:

None

SUBSIDIARIES:

Neenah and Menasha Water Power Co.
Australian Paper Manufacturers Limited
Kimberly-Clark Australia Pty. Limited
Spruce Falls Power and Paper Co. Ltd.
Compania Colombiana de Tobaco S.A.
Colombiana Kimberly S.A.
Colombiana Universal de Papeles S.A.
Distribuidora de Manufacturas
Centroamericanas, S.A.
Kimberly-Clark de Centro America S.A.
LTR Industries, S.A.
Comercial Papelera S. de R.L.
P.T. Kimsari Paper Indonesia
Yuhan-Kimberly Limited
Kimberly-Clark Malaysia Sendirian Berhard
Kimberly-Clark de Mexico S.A. de C.V.

Kimberly-Clark Philippines, Inc.
K.C.S.A. Holdings (Pty.) Limited
Carlton Paper Corporation Limited
SK Corporation
Kimberly-Clark Thailand Limited

PETITIONER:

Levi Strauss & Co.

PARENT:

Levi Strauss Associates, Inc.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Longview Fibre Company

PARENT:

Longview Fibre Company stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Lucas Western, Inc.

PARENT:

Lucas Aerospace, Inc.

SUBSIDIARIES:

None

PETITIONER:

Mars, Incorporated

PARENT:

No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None

PETITIONER:

E.M. Matson, Jr., Co., Inc.

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

McGraw-Edison Company (Bussman and Halo Lighting Divisions)

PARENT:

Cooper Industries, Inc.

SUBSIDIARIES:

Pluz, S.A.

PETITIONER:

Mead Corporation (The)

PARENT:

The Mead Corporation stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Adena Syndicate, Ltd.
Aquatair Corporation
Cycolor, Inc.
Devres MS Co.

Escanaba Land Co.
Escanaba Paper Co.
Forest Kraft Co.
Illinois Code Company
InfoSource, Inc.
Lexis, Inc.
M-B Pulp Company
Mead Coated Board, Inc.
Mead Data Central, Inc.
Mead Data Central Int'l., Inc.
MDC Acquisition Corporation
Mead Emballage, S.A.
Mead-Pac A.B.
Mead Environmental Improvement Corp.
Mead Realty Group, Inc.
Mead Leasing Company
Mead Loss Control Consultants, Inc.
Mead Packaging International, Inc.
Mead Panelboard, Inc.
Mead Pulp Sales, Inc.
Mead Real Estate Investments, Inc.
Mead RECO, Inc.
Mead Reinsurance Corp.
Mead Release Products
Mead SA, Inc.
Mead Supplyco, Inc.
Mead TI, Inc.
Mead Timber Co.
Mead T-P Holding Company
Micromedex, Inc.
M-T Properties Inc.
Nexis, Inc.
Pulp Asia Ltd.
R Corporation
Sistemas de Envases y Embalaje, S.A.
Seiko Mead Corporation
Harima M.I.D., Inc.
Thzco, Inc.
UPL Corporation

Ampad Corporation
Huron Office Products, Inc.
North Stratford Paper Products, Inc.
Mead Toppan Company, Ltd.
Northwood Forest Industries, Ltd.
B.C. Chemicals, Ltd.
International Fibre Sales, S.A.

PETITIONER:

Miller Brewing Company

PARENT:

Philip Morris Companies, Inc.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Monsanto Company

PARENT:

Monsanto Company stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Advent Capital
Advent Equity Income
Advent Euroventures (Mass. partnership)
Alafi Capital Co. (Calif. partnership)
ASYST Technologies, Inc.
Farmaryn Pharma Verwaltungs GmbH
FISCO Ltd.
Gateway Mid-America Partnership
G.D.S. Pharma GmbH
G.D.S. Pharma GmbH & Co. KG
Hong Kong Venture Investment Trust
Laboratoires Searle S.A.
Montor Joint Venture

Monsanto (Malaysia) Sendirian Berhad
Nippon Fisher Company, Ltd.
Novellus
P.T. Monagro Kimia
Schiapparelli-Searle S.r.l.
Searle Bangladesh Ltd.
Searle Korea Ltd.
Searle Pakistan Ltd.
Searle Yakuhin, K.K.
Seavic
Southwall Technology
St. Louis Equity Funds Inc.

PETITIONER:

Mrs. Smith's Frozen Foods Co.

PARENT:

Kellogg Company

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Murray Pacific Corporation

PARENTS:

No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None

PETITIONER:

Noel Corporation d/b/a Noel Canning Corporation

PARENTS:

No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None

PETITIONER:

Okonite Company (The)

PARENT:

The shares of The Okonite Company are held by The Okonite Employees' Stock Ownership Trust.

SUBSIDIARIES:

None

PETITIONER:

Onan Corporation

PARENT:

Cummins Engine Co. (Onan Holdings, Inc.)
Hawker-Siddeley, Ltd.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Outboard Marine Corporation

PARENTS:

None

SUBSIDIARIES:

Adventurent, Inc.
Bramco, Inc.
Carl A. Lowe Industries, Inc.
Chris-Craft Mahogany Runabout Co.
Club Nautico, Inc. (Florida)
Club Nautico of Freeport (NY)
Club Nautico of Point Clear, Inc.
Club Nautico of Puerto Rico

Donzi Boat Owners Association, Inc. (Florida)
Donzi Marine Corporation
Donzi Realty, Inc. (Florida)
Easy Company, Inc.
Four Winns, Inc.
Four Winns of Texas, Inc.
Four Winns Yacht Division, Inc.
Graphic Adz, Inc. (Florida)
Hydra-Sports Corporation
Hydra-Sports, Inc.
International Boat Rentals, Inc. (Florida)
International Yacht Investments, Inc. (Florida)
Lawn-Boy Distributors, Inc.—New England
Marine Fabricators, Inc.
Ocean City Boat Rentals, Inc.
Octian, Inc.
OMC Deutschland GmbH
OMC Development Inc.
OMC Distributors, Inc.—Fort Wayne
OMC Distributors, Inc.—Minneapolis
OMC Distributors, Inc.—San Francisco
OMC Europe
OMC Finland A.B.
OMC France SARL
OMC (U.K.) Ltd.
OMC Nederland B.V.
OMC Norge A.S.
OMC Sverige
OMCCC, Inc. (Delaware)
OMCGB Inc.
Outboard Marine Acceptance Corporation (OMAC)
Outboard Marine Asia Limited (OMASIA)
Outboard Marine Corporation Australia Pty., Limited (OMAR)
Outboard Marine Corporation of Canada, Ltd. (OMCOL)
Outboard Marine Danmark A/S
Outboard Marine Domestic International Sales Corporation (OMDISC)

Outboard Marine Foreign International Sales Corporation (OMFISC)
Outboard Marine Foreign Sales Corporation (OMFSC) Virgin Islands
Outboard Marine Holdings, Inc.
Outboard Marine International, Inc. (OMINC)
Outboard Marine International S.A. (OMISA)
Outboard Marine International Sales Corporation (OMISC)
Outboard Marine de Mexico, S. A. de C.V. (OMEX)
Outboard Marine Motors Amazonia LTDA. (Brazil)
Outboard Marine Venture Capital Corporation (OMVCC)
Ryds Batindustri, AB (Sweden)
Sea Nymph, Inc.
Stratos Boats, Inc., formerly OMC Acquisitions, Inc.
Sunbird Boat Co., Inc.
Syracuse Transportation, Inc.
Toledo Boat Rental, Inc.
Top of the Dock, Inc.
USVI Boat Rentals, Inc.

PETITIONER:

Owens-Corning Fiberglas Corp.

PARENT:

Owens-Corning Fiberglas Corp. stock is publicly traded.

SUBSIDIARIES:

Toledo Air Associates
Transitions Research Corporation
Vitro-Fibras, SA
Asahi Fiber Glass Co., Ltd.
Amiantit
CAE Fiberglas Ltd.
OC Birdair

PETITIONER:

Quaker Oats Co., Inc. (The)

PARENTS:

The Quaker Oats Co., Inc. stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Quinton Instrument Company

PARENT:

A.H. Robins Company, Incorporated

SUBSIDIARIES:

None

PETITIONER:

Remington Arms Company

PARENT:

E.I. du Pont de Nemours and Company

SUBSIDIARIES:

Industrias Tecnos, S.A. de C.V.

PETITIONER:

Reynolds Metals Company

PARENTS:

Reynolds Metals Company stock is publicly traded on the New York Stock Exchange. The only corporation owning 5% or more of Petitioner is Templeton, Galbraith & Hausberger, Ltd.

SUBSIDIARIES:

Eskimo Pie Corporation
Halco (Mining), Inc.
Volta Aluminum Company Limited
Albev Trading, Inc.
Aluminio Reynolds del Peru Sociedad Anonima
Aluminium Corporation of the Philippines
Compagnie des Bauxites de Guinee
Eskimo Europ, S.a.r.l.
Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocomia, S.A.
Manicouagan Power Company
Mineracao Rio do Norte S.A.
New Eastwick Corporation
Phillips-C.B.A. Conductors Limited
Reynolds Philippine Corporation
Worsley Alumina Pty., Ltd.
Bennett Manor Associates
Burrstone Associates
Cathedral Square Associates
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Drew Gardens Associates, Ltd.
Midtown Associates
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Rayburn Manor Associates
Titusville Manor Associates
Eastwick Joint Venture I
Eastwick Joint Venture IV
Mount Gibson Joint Venture
The Reynolds-Gilbane-Weybosset Joint Venture
Worsley Joint Venture
1401 17th Street Associates
Crown Oak Associates of Penfield
Kimbrook Manor Associates, Ltd.
Alternative Housing Associates
Bartram Airplex Incorporated

Quadrangle Development
Eastwick Joint Venture V & VII
Aluminerie de Becancour, Inc.
Arteaga, Sociedad Anonima, "Arteaga, S.A."
Becancour Joint Venture
Boddington Joint Venture
ES/PA, L.P.
Industrias del Lacado, S.A. (INDULACSA)
Industrias Gomariz, S.A.
Pechiney Reynolds Quebec, Inc.
Ruedas de Aluminio C.A. "RUALCA"

PETITIONER:

Scott Paper Company

PARENTS:

None

SUBSIDIARIES:

Taiwan Scott Paper Corporation
Scott Paper Limited
Scott Paper Company de Costa Rica
Sanyo Scott Company, Limited
Ssangyong Paper Co., Ltd.
Compania Industrial de San Cristobal
Scott Trading Limited
Thai-Scott Paper Company Limited
Canso Chemicals Limited
Mountain Tree Farm Company
Copa-Companhia de Papisis
Wincup, Inc.
Scott Iberia, S.A.

PETITIONER:

Seattle FilmWorks, Inc. (formerly American Passage Marketing Corporation)

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

Shields Bag & Printing Co.

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

Shulton, Inc.

PARENT:

American Cyanamid Company

SUBSIDIARIES:

None

PETITIONER:

Square D Company

PARENTS:

Square D Company stock is traded on the New York Stock Exchange. Entities owning more than 5% of Petitioner are:

Leland Freres & Co.

SUBSIDIARIES:

State Street Research and Management Co.
Palatine Hills Leasing, Inc.
Square D Andina, S.A.
Daito Topaz Co. Ltd.

PETITIONER:

Stokely-Van Camp, Inc.

PARENT:

The Quaker Oats Company

SUBSIDIARIES:

None

PETITIONER:

Sun Sportswear

PARENTS:

None

SUBSIDIARIES:

None

PETITIONER:

Tektronix, Inc.

PARENTS:

Tektronix, Inc. stock is publicly traded. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Sony Tektronix Corporation
Textronix S.A. de C.V.

PETITIONER:

Thomasville Furniture Industries, Inc.

PARENT:

Armstrong Industries, Inc.

SUBSIDIARIES:

None

PETITIONER:

Triangle Pacific Corp.

PARENT:

TPC Holding Corp.

SUBSIDIARIES:

None

PETITIONER:

Uncle Ben's Inc.

PARENT:

Mars, Incorporated

SUBSIDIARIES:

None

PETITIONER:

U.S. Oil & Refining Co.

PARENT:

Time Oil Co.

SUBSIDIARIES:

None

PETITIONER:

W.R. Grace & Co.—Conn.

PARENT:

W.R. Grace & Co.

SUBSIDIARIES:

Del Taco Corporation
Del Taco Restaurants, Inc.
Grace Drilling Company

AWI
Denke Grace K.K
Dunbee-Elm Ltd.
Fuji-Davison Chemical Ltd.
Kabushi Kaisha Furukawa Seisakusho
Grace Energy Corporation
Grace Environmental, Inc.
National Medical Care, Inc.
Flowdrill Corporation
Grace Sierra Horticultural Products Company
Neue Transvac Maschinen A.G.
Nippon Belt Nogyo Kabushiki Kaisha
Productora de Papeles S.A.
Sierra Chemicals Company
Teroson Kabushiki Kaisha
Trinidad Nitrogen Co., Limited

PETITIONER:

Welch Foods, Inc., a cooperative

PARENT:

National Grape Cooperative Association, Inc.

SUBSIDIARIES:

The Springfield Bank for Cooperatives
Cooperating Brands, Inc.
Welch Foods of Japan, Inc.

PETITIONER:

Western Bottling Company

PARENTS:

MBA Western Co. (wholly owned by Alpac Corporation)

SUBSIDIARIES:

None (except wholly owned)

PETITIONER:

Westinghouse Electric Corporation

PARENTS:

Westinghouse Electric Corporation stock is traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Adept Technologies
Airspace Management Systems
Allegheny Housing Rehabilitation Authority
Automobile Equity Agreement
Barton Pipeline & Water
Boeing Industrial Technical Group
Biotronics System Corporation
CATV Enterprises
Cole-Taylor Financial Group
Computer Aided Training Co., Inc.
Development Credit Corporation of Maine
Fink Property Bonds
Gamma Metrics
Industrial Ceramics, Inc.
Infrared Fiber Systems, Inc.
Inova, Microelectronics, Inc.
Instrumar
Integrated Communication Systems
Inter-Continental Electric Corporation
International Disposal Corporation
JPA Development Corporation
Metro Sports Arena
Micro Electronics & Computer Technology Corp.
Micro Systems
Mirwec Film, Inc.
Photocomm, Inc.
Reinhausen
RIDC Industrial Development Fund
River Towers Corporation

Rostone De Puerto Rico
Semic/Inepar
Space Industries
Speech Plus
Texas New Mexico Project
Theta J. Corporation
Turbine Metal Technologies, Inc.
United Western Technologies
WM Power Products, Inc.
Compagnie des Dispositifs
Semiconducteurs Westinghouse
Eletromar Industria Eletrica Brasileira, S.A.
Enwesa Servicios S.A.
Vektron, S.A.
WEXICO Systems and Services, Ltd.
AEG-Beteilingunsgellschaft MBH
C&K, Ltd.
Elektrik Technizati Imalatic Tesisati, AS
ENWESA Servicos, S.A.
Eregli Demir Ve Celik Fabrikalari, AS
Escorts, Ltd.
Goldstar Vacuum Apparatus Company
Hellenic Business Development Investment Co., S.A.
IEM, S.A. de C.V.
Industrias IEM, S.A. de CV
Korea Development Investment Corporation
Korea Technical Advancement Corporation
Korea Technology Advancement Corporation
Lor-West, Limited
Lor-West Services Europe, Ltd.
Mecanica Peseda, S.A.
Mex-Control
Mitsubishi Nuclear Fuel Company, Ltd.
Mitsubishi Nuclear Fuel Transportation
System Company, Ltd.
Serratos & Castells, S.A.
Siam Torcuato Di Tella, S.A.
Sociedad Industrial Americana

Maquenarias, S.A.
Vektron, S.A.
Westinghouse Do Brasil, S.A.
Westinghouse Industria Electrica Brasleira, S.A.
W.S. Insulators (India), Ltd.

PETITIONER:

Xerox Corporation

PARENTS:

Xerox Corporation stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Petitioner's stock.

SUBSIDIARIES:

Xerox Canada, Inc.
Rank Xerox

FILED
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CLERK

NO. 89-1854 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should interstate businesses be relieved of the obligation to pay Washington B&O tax because other states have chosen to impose income, value added and property taxes that do not qualify for Washington's B&O tax credit rather than imposing manufacturing and selling transaction taxes that do qualify for Washington's B&O tax credit?

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NO. 89-1854

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

WHAT THIS CASE IS REALLY ABOUT

Washington imposes transaction taxes on the activities of manufacturing and selling products in this State. As part of its tax system Washington adopted the credit mechanism suggested by this Court in *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987). This credit mechanism entitles a business to take a credit against Washington's manufacturing and selling transaction taxes equal to the manufacturing or selling transaction tax it pays to another jurisdiction. Washington does not grant the credit for other types of

taxes paid by a business such as income, value added and property taxes.

Petitioners paid Washington tax on their manufacturing and selling activities in this State. Petitioners agree that there is sufficient nexus to impose the tax; that the tax is fairly apportioned; and that the tax is fairly related to the services provided by the State. Petitioners seek a refund of all the tax paid on their manufacturing and selling activities in Washington because they claim the tax discriminates against interstate commerce.

This case is not about the proper application of the credit. Petitioners did not claim credits under the law. Petitioners' complaint does not allege the State wrongly denied credit by improperly classifying a manufacturing or selling transaction tax that does qualify for credit as an income or other tax that does not qualify for credit.

Petitioners claim they should be relieved of all the tax on their manufacturing and selling activities because Washington does not allow credit for payment of different types of taxes, such as income, value added and property taxes, when other states choose to impose these taxes rather than imposing transaction taxes like Washington. The essence of petitioners' claim is that Washington cannot impose its manufacturing and selling taxes, unless the State grants interstate businesses a credit for any tax the businesses pay to another jurisdiction.

STATEMENT

The Statement of the Case presented by American National Can[1] (ANC) and other petitioners is largely irrelevant. The statement dwells on the history of Washington's business and occupation (B&O) tax and other tax alternatives to repair the system after *Tyler Pipe*, 483 U.S. 232 (1987). Pet. 2-6. Prior versions of the B&O tax and other tax alternatives are not before this Court. The one piece

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[1]For ease of reference we will simply refer to ANC when referring to petitioners unless the context indicates otherwise.

of history that is important - the rationale of this Court in *Tyler Pipe* - is barely discussed. ANC's discussion of the operation of the challenged tax credit is also incomplete and inaccurate. Pet. 6-9. Accordingly, we offer the following counterstatement.

I. OPERATION OF THE B&O TAX AND CREDIT.

A. Tyler Pipe Invalidated The Multiple Activities Exemption Because it Lacked Internal Consistency.

We begin with this Court's decision in Tyler Pipe and Washington's response to the decision. Tyler Pipe involved Washington transaction taxes imposed on the activities of manufacturing and selling.[2] The manufacturing tax was imposed on every person engaged in business as a manufacturer in Washington. Wash. Rev. Code § 82.04.240. Pet. 47a. The selling tax was imposed on every person making sales in Washington, either wholesale or retail. Wash. Rev. Code §§ 82.04.270, 82.04.250. Pet. 48a. The manufacturing and selling taxes had the same basic rate - .0044. Wash. Rev. Code §§ 82.04.240, 82.04.250, 82.04.270. These taxes also had the same measure - value of the products/ gross proceeds of sale.[3] The measure is the base to which the rate is applied.

These features of the B&O tax remain the same today and were of no concern to the majority in *Tyler Pipe*. The majority focused on the multiple activities exemption, Wash. Rev. Code § 82.04.440 (1985) which has since been

---

[2]Some petitioners also challenge Washington's tax on extracting. Wash. Rev. Code § 82.04.230. Pet. 47a. Our discussion of manufacturing and selling also applies generally to extracting.

[3]The measure of the selling tax is the "gross proceeds of sales" in Washington. Wash. Rev. Code §§ 82.04.250, 82.04.270. The measure of the manufacturing tax is the "value of the products" manufactured, which is determined by the "gross proceeds derived from the sale thereof." Wash. Rev. Code §§ 82.04.240, 82.04.450.

repealed. The multiple activities exemption provided that "[p]ersons taxable under [retailing] or [wholesaling] shall not be taxable under [manufacturing] with respect to * * * manufacturing of the product so sold." Wash. Rev. Code § 82.04.440(2) (1985).

The majority held "Washington's multiple activities exemption invalid". 483 U.S. at 253. The former exemption from manufacturing tax was defective because it only applied if a business paid Washington selling tax. It did not apply if selling tax was paid to another state.

Thus, the multiple activities exemption violated the principle of internal consistency - "that is the [tax] must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." 483 U.S. at 247 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). If every jurisdiction imposed the transaction taxes at issue in *Tyler Pipe*, interstate commerce would pay two taxes - a manufacturing tax to Washington and a selling tax to another state - because the former exemption did not apply. Local commerce would pay only one tax - Washington selling tax - because the former exemption did apply.

An integral part of *Tyler Pipe* was the majority's explanation of how to repair the system. Washington could make the former exemption internally consistent by extending its benefits to interstate commerce. This Court stated:

> The * * * condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington.

483 U.S. at 246. This credit prescription was repeated later in the opinion when the Court stated that "an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes

paid to other States would presumably cure the discrimination." 483 U.S. at 249.

Extending a credit to taxes on wholesale transactions and manufacturing transactions paid to any state, not just Washington, repairs the system by making it internally consistent.

B. After Tyler Pipe, Washington Adopted a Credit For Transaction Taxes Paid to Other Jurisdictions.

Tyler Pipe was handed down on June 23, 1987. Less than two months later on August 10, the Washington Legislature met in special session. The Legislature repealed the multiple activities exemption and enacted the credit mechanism suggested by this Court. Wash. Rev. Code § 82.04.440 (1987). Pet. 48a-50a.

Under the new credit mechanism both local and interstate businesses are entitled to a tax credit against Washington's selling tax. The Washington transaction tax imposed on the sale of a product may be reduced by the amount of manufacturing tax paid to Washington or another jurisdiction on the transaction of manufacturing the product. Wash. Rev. Code § 82.04.440(2).

A credit is also available for Washington manufacturers selling in interstate commerce.[4] This is a credit against Washington manufacturing tax. The Washington tax imposed on the transaction of manufacturing a product may be reduced by the amount of selling tax paid to another jurisdiction on the transaction of selling the product. This credit is only available for selling tax paid to a jurisdiction other than Washington. Wash. Rev. Code § 82.04.440(3). The end result is the two-way credit mechanism prescribed in *Tyler Pipe*.

ANC's description of the operation of the credit is incomplete. ANC gives the impression that only taxes in

---

[4]This credit was initially adopted on a contingent basis in 1985 and went into effect when *Tyler Pipe* was decided. Wash. Laws 1985, c. 190 § 1.

Delaware, Hawaii and Indiana qualify for credit. ANC neglects to mention that Washington allows credit for taxes paid to the political subdivisions of other states as well as any foreign country or political subdivision thereof. Wash. Rev. Code § 82.04.440(5)(b) (ii), (iv).[5]

The credit is working. Between June 1987 and October 1988 interstate businesses claimed credits totaling $1,303,973. Pet. 34a. ANC complains that this sum is insignificant. Pet. 9. However, ANC is well aware that some businesses have elected not to claim the credit.

Twelve of the petitioners in this case have paid taxes that qualify for credit but they have not claimed the credit.[6] According to the twelve petitioners' calculations, the total amount of unclaimed credit is $69,981 for the period between September 1987 and August 1988.[7] Two other petitioners paid qualifying taxes but they did not calculate the amount of the credit or claim it.[8] (Another eight petitioners did not claim credit because they report paying no taxes to any jurisdiction save Washington, even though they are engaged in interstate commerce.[9])

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[5]In this respect Washington enacted a more extensive credit than *Tyler Pipe* required. Local business in Washington receives no credit against State B&O taxes for B&O taxes paid to Washington political subdivisions. Yet Washington allows a credit against its B&O taxes for taxes paid to the political subdivisions of other states. Wash. Rev. Code § 82.04.440(5)(b)(i), (ii). ANC's appendix lists taxes from 27 jurisdictions that qualify for credit. Pet. 26a-36a. However, ANC omits the fact that this number has increased. At present there are 58 jurisdictions that impose qualifying taxes including a tax imposed by Canada. Excise Tax Bulletin 543.04.19301 (June 30, 1989). This list is not exclusive. The process of idenifying qualifying taxes is ongoing.

[6]According to these twelve petitioners, they did not claim the credit because they thought a special and expensive record keeping system was necessary. See *infra* p. 6, n.7. Petitioners apparently misunderstood the law. The State does not require a special record keeping system and verifies the credit the same way it verifies other tax adjustments. Affidavit of Les Jaster.

[7]Petitioners obtained a protective order requiring the State to refer to affidavits by number rather than by name. Petitioners' Affidavit Nos. 79, 81, 82, 84, 86, 88, 91, 92, 94, 95, 99, 100.

[8]Petitioners' Affidavit Nos. 1, 48.

[9]Petitoners' Affidavit Nos. 30, 36, 38, 43, 45, 47, 51, 55.

At this point it is impossible to know the cost of the credit to Washington.[10] The statute of limitations for 1987, the first year of the credit's operation, does not expire until December 31, 1991. Wash. Rev. Code §§ 82.32.060, 82.32.050. Businesses will be entitled to seek refunds, owing to credits claimed, until that date.

ANC asserts that Washington only allows credit if the labels and calculations of another jurisdiction's taxes conforms perfectly with Washington's taxes. Pet. i, 8-9, 18-19. In the proceedings below ANC did not challenge the Washington Department of Revenue's (Department) decision to disallow credit for any particular tax. ANC's complaint challenges the imposition of Washington's manufacturing and selling taxes without regard to the credits available under the law.[11]

Moreover, ANC's claim that Washington requires perfect conformity is inaccurate. It is true that Washington does not allow credit for some different kinds of taxes such as income, value added and property taxes. But these taxes are fundamentally different from transaction taxes like Washington's B&O tax on manufacturing and selling.[12]

We can demonstrate that ANC's claim is inaccurate by looking at the taxes already qualified for credit. Washington has approved taxes for credit with different labels than Washington. For example: Indiana's "Gross Income" tax and Kansas City, Missouri's "License Fee" have different labels but qualify for credit. Pet. 28a, 30a.

Washington also allows credit for taxes with different calculations. For example, Washington allows credit for

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[10]When the credit mechanism was pending before the Legislature the Department of Revenue estimated the cost of the credit, during the 1987-89 biennium, to be $42 million. Exhibit 7. The Department subsequently reduced this estimate to $30 million. Exhibit 12.

[11]Petitioners' Supplemental Complaint § 2.2 states: "Plaintiffs are entitled to refunds of all B&O taxes paid and which will be required to be paid in the future on the grounds that the Replacement B&O Tax law violates the United States Constitution and is, therefore, invalid."

[12]See *infra* p. 12-13.

the payment of Delaware's Manufacturer's License Fee, Del. Code Ann. tit. 30 § 2702(b) (1988). Pet. 28a. In computing the tax Delaware does not tax the first $600,000 of aggregate gross receipts each month. Del. Code Ann. tit. 30 § 2702(b)(1) (1988). On the other hand, Washington's B&O tax applies to all gross receipts in excess of $1,000 per month. Wash. Rev. Code § 82.04.300. This difference did not disqualify the Delaware tax.

II. APPLICATION OF THE B&O TAX CHALLENGED BY ANC.

To put the case in context we will briefly describe how the B&O tax applies to petitioners. Since ANC challenges both the manufacturing and selling taxes, it represents the basic fact pattern for all petitioners.

ANC sells packaging products throughout the world. These products are manufactured by ANC in 28 states, including Washington. Pet. 38a, §§ 1.1.2, 1.1.3. ANC employs approximately 240 people in Washington. These employees are involved in the manufacture of products at two plants located in this State. This number also includes ANC's Washington sales office. Pet. 38a §§ 1.1.4, 1.1.6.

ANC pays manufacturing B&O tax on the transactions of manufacturing products in Washington that it sells elsewhere. If the value of the products ANC manufactures in Washington is $1,000, its manufacturing tax is $4.40 ($1,000 x .0044). ANC also pays selling B&O tax on the transactions of selling products in Washington that it manufactures elsewhere. If the gross proceeds of ANC's Washington sales is $1,000, its selling tax is $4.40.

Because the B&O tax is a transaction tax, it does not apply to transactions that take place outside this State. Thus, if ANC manufactures $1,000 of goods in California and sells them in Oregon, there is no Washington tax on that $1,000.

ANC seeks a refund of all of the manufacturing and selling taxes it has paid. ANC claims there should be no

B&O tax on its manufacturing and selling activities in Washington. For the period between September 1987 and August 1988, 30 petitioners in this case seek a refund of manufacturing tax in the amount of $10,535,715[13] and 60 petitioners seek a refund of selling tax in the amount of $11,176,970.[14]

REASONS WHY THE PETITION SHOULD BE DENIED

I. ANC MISCHARACTERIZES THE ISSUE IN THIS CASE.

ANC mischaracterizes the issue in this case. According to ANC the issue is whether Washington can limit application of the credit by requiring the labels and calculations of other states' taxes to conform precisely to Washington's. Pet. i. ANC tries to create the impression that the State has denied credit for manufacturing and selling transaction taxes by improperly classifying them as income or other taxes. This characterization is inaccurate. See *supra* p. 7-8.

More important for purposes of this Court's jurisdiction, the issue before the Court does not involve the question whether the State denied credit by improperly classifying a manufacturing or selling transaction tax as an income or other tax. The Washington Supreme Court recognized this in the decision below:

> The taxpayers do not challenge the interpretation of the statute or the Department's selection of taxes. * * * Nor do they argue that the Legislature or the Department failed to provide credits for every manufacturing tax. The taxpayers in effect concede that the Legislature did what the Supreme Court said

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[13]Petitioners' Affidavit Nos. 6, 17, 18, 20, 21, 30, 35, 36, 38, 40, 42, 45, 46, 47, 49, 50, 51, 52, 54, 55, 56, 57, 62, 65, 69, 70, 71, 74, 76, 77.

[14]Petitioners' Affidavit Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 37, 39, 41, 43, 44, 46, 48, 49, 50, 52, 53, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76.

was necessary in *Tyler*.

> But they object to the fact that by its terms the new law grants no credits for income taxes or excise taxes paid in other states.

American National Can Corp. v. Dept. of Revenue, 114 Wash.2d 236, 242, 787 P.2d 545 (1990). Pet. 5a.

The record in this case supports the Washington Supreme Court's statement. ANC discusses taxes in Oregon,[15] Michigan,[16] and Alaska[17], it claims were improperly excluded. Pet. 12-15. However, only one of these taxes was included in ANC's January 14, 1988 request to the Department for a ruling on whether certain taxes qualified for credit.[18] The Department denied credit for that tax. Pet. 31a. However, ANC's complaint does not take issue with the Department's ruling.

A taxpayer is certainly entitled to challenge the Department's decision to disallow credit for a particular tax. Whether such a challenge will produce a substantial federal question to be resolved by this Court remains to be seen. However, it is not this case. What is before this Court is ANC's assertion that if Washington allows a credit for one kind of tax, it must allow a credit for every tax paid by an interstate business.

II. THE COMMERCE CLAUSE DOES NOT REQUIRE WASHINGTON TO ALLOW CREDIT FOR THE PAYMENT OF INCOME AND OTHER TAXES.

A. The Internal Consistency Test Does Not Require a State to Give Credit for Other Types of Taxes.

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[15]Or. Rev. Stat. § 317.070 (1989). Pet. 53a.

[16]Mich. Comp. Laws § 208.31 (1989). Pet. 53a.

[17]Alaska Stat. §§ 43.55.011, 43.75.015 (1989). Pet. 50a-51a.

[18]Alaska Stat. § 43.75.015. Pet. 28a-29a, 31a-32a.

The gravamen of ANC's attack on the B&O tax is that Washington only allows credit for manufacturing and selling transaction taxes and that too few taxes qualify because other states impose different types of taxes such as income taxes. Pet. 12-14. Essentially ANC claims that if a state treats two taxes as equivalent for local purposes through a credit mechanism - like the manufacturing and selling taxes - it must treat every tax as equivalent. And the state must allow interstate businesses a credit for any tax they pay to another state.

The internal consistency test applied by this Court in *Tyler Pipe*, 483 U.S. 232 (1987) does not require credit for different kinds of taxes that are not treated as equivalent by the state itself. "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg v. Sweet*, 109 S.Ct. 582, 589 (1989). Under the internal consistency test, if a state treats two taxes as equivalent for local purposes it must treat those taxes as equivalent when paid to another state.

This Court's decisions involving credits recognize this principle. For example, the use tax sustained in *D. H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) included a credit. The credit was limited to "taxpayers who have paid a *similar tax* upon the sale or use of the same tangible personal property in another state." 486 U.S. at 31 (quoting La. Rev. Stat. Ann. § 47:303(A) (West 1970)) (Emphasis added). In *Goldberg* the Court approved an Illinois telecommunications tax with a credit for "other States' telecommunication taxes". 109 S.Ct. at 590. Even in *Tyler Pipe* this Court referred to a credit for "wholesale taxes paid by local manufacturers to any State, not just Washington" and a credit for "manufacturing taxes paid to other States". 483 U.S. at 246, 249.

The taxes in *Holmes* and *Goldberg* are valid even though the credits only applied to similar taxes. The same is true of Washington's manufacturing and selling taxes.

The validity of these taxes does not turn on allowing credit for different types of taxes such as income taxes.

In *Goldberg*, 109 S.Ct. at 589, this Court recognized that Washington's manufacturing and selling taxes are similar to the sales and use taxes in *Holmes* and the telecommunications tax in *Goldberg*. The key is that all of these taxes are on specific transactions - the activity of selling a product; the activity of using a product; the activity of manufacturing a product; or the activity of making a telephone call - measured by the gross receipts from that specific transaction.

An income tax is fundamentally different because it is not concerned with any particular transaction.[19] Instead, the income tax focuses on a business' total income from all activities.[20] This Court recognized the fundamental difference between an income tax and a transaction tax in *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207 (1980). In *Exxon* the taxpayer sought to exclude from the measure of its Wisconsin income tax the income on oil and gas extracted in other states. The taxpayer argued that other states' severance taxes posed a risk of multiple burden. A severance tax is another kind of transaction tax.

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[19]Similarly, value added taxes are fundamentally different than transaction taxes. "Both income taxes and value-added taxes are taxes on the economic process .* * * In the end, the income tax and the [value-added tax] tax the same things, but at different stages of the economic process, and thus generate the same amount of revenue and affect the economy identically." *Mobil Oil Corp. v. Department of Treasury*, 422 Mich. 473, 373 N.W.2d 730, 739-40 (1985).

[20]The fundamental difference between transactions taxes like Washington's selling and manufacturing taxes and income taxes also means it would be extremely difficult to provide a credit for an income tax. When a retail sales tax or manufacturing tax is paid with regard to a particular product it is relatively easy to apply the credit to offset a use tax or selling tax on that product. An income tax is paid on apportioned net income. There is no way to know what part of the tax relates to a particular manufacturing or selling activity. In addition, "all sales are not equally profitable". *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276 (1978). Thus, if a business pays income tax in a state where it has a manufacturing facility, it would be exceedingly difficult to know what part of the tax was attributable to Washington sales and what part of the tax was attributable to sales in another state–not to mention the fact that some of the tax may be attributable to income having nothing to do with the businesses' selling or manufacturing activities.

The transaction is the activity of taking or producing minerals and other natural resource products.

The Court rejected this argument noting the fundamental differences between these types of taxes. The Court stated:

> Severance taxes, however, are directed at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities. * * * The Wisconsin Supreme Court therefore properly concluded that "[t]he fact that the producing states may impose * * * severance taxes which have been held to be occupation taxes or property taxes does not render unfair or unconstitutional Wisconsin's efforts to reach a proportionate share of the taxpayer's income."

447 U.S. at 228-9 n.12 (citations omitted). Transaction taxes are directed at a different aspect of a business than income taxes.

B. ANC's Claim is Contrary to The Principle That The Validity of a State's Tax Does Not Depend on Other States' Taxes.

ANC agrees that Washington's tax system is internally consistent (Pet. 9) but still maintains that the taxes are discriminatory. ANC's complaint is that too few taxes qualify for credit. Would this complaint disappear if more states enacted manufacturing and selling taxes similar to Delaware, Hawaii and Indiana[21] or would it require such action by all other states?

The sole reason Washington's credit does not apply more broadly now is that other sovereign states have made different tax choices - enacting income and other taxes instead of transaction taxes on manufacturing and selling. ANC's whole claim is based on the fact that other states have made these choices.

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[21]Pet. 28a.

ANC's contention is directly contrary to the principle that the validity of one state's tax system does not depend on the tax laws of other states. *Freeman v. Hewitt*, 329 U.S. 249, 256 (1946). Instead of looking to other states' tax laws, as ANC suggests, this Court developed the internal consistency test.

The Court applies the hypothetical internal consistency test because "[a]ny other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States * * *. *Tyler Pipe*, 483 U.S. at 247 (quoting *Armco*, 467 U.S. at 644-45).

This Court has already rejected the contention that an internally consistent tax can be invalidated because of different taxes imposed by other states. The Court rejected essentially the same claim in *Goldberg* where the taxpayer sought to broaden the internal consistency test to include other types of taxes. The Court refused stating:

> If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on "the shifting complexities of the tax codes of 49 other States."

109 S. Ct. at 589.

The fact that two states have different tax systems does not render either of them discriminatory. The Court spoke to this point in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). In *Moorman* the taxpayer made a similar claim that the interaction of Iowa's single factor apportionment formula and Illinois' three factor formula rendered Iowa's tax system discriminatory. The Court rejected the discrimination claim:

> The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter.

437 U.S. at 277 n.12.

Likewise, Washington treats interstate and local business with an even hand. The credit applies to manufacturing and selling taxes paid to any jurisdiction. Washington is not responsible for the fact that other states have adopted income and other taxes instead of manufacturing and selling taxes.

III. WASHINGTON'S B&O TAX AND CREDIT FOLLOW THIS COURT'S DECISION IN TYLER PIPE AND DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

ANC argues that both the manufacturing and selling B&O taxes violate the Commerce Clause, art. I, § 8, cl. 3 of the United States Constitution. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) this Court laid down four tests for assessing the Commerce Clause validity of a state tax: (1) there must be a sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state.

Before the Washington Supreme Court ANC agreed that there was (1) sufficient nexus to impose the tax; (2) that the tax was fairly apportioned; and (4) that the tax was fairly related to the services provided by the state. ANC's challenge was based solely on the third prong - that a tax must not discriminate against interstate commerce. *American National Can*, 114 Wash.2d 236, 241. Pet. 4a.

The discrimination prong prohibits a state from imposing a tax "which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 329 (1977) (citations omitted). That is,

"a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

Washington's selling and manufacturing taxes do not discriminate against interstate commerce, for Washington does not tax the activities of manufacturing and selling more heavily when they cross state lines.

ANC describes Washington's credit as an "artifice" (Pet. 16) and urges the Court to take this case because other states will observe that Washington will have cured the discrimination condemned in *Tyler Pipe* without eliminating the reality of disparate treatment of local and interstate business. Pet. 16.

ANC's statement completely ignores the holding of *Tyler Pipe*, 483 U.S. 232 (1987). The disparity of treatment was that the former multiple activities exemption applied upon the payment of Washington selling tax, but did not apply upon the payment of selling taxes to other states. See *supra* p. 3-5.

When ANC speaks of disparate treatment, it always refers to a system that utilizes a three factor apportionment formula. Pet. 9, 16 n.13. Yet *Tyler Pipe* did not invalidate the multiple activities exemption on apportionment grounds and ANC now concedes that Washington's manufacturing and selling taxes are fairly apportioned.

The lesson others states may properly draw from *Tyler Pipe* is that the Court will apply the internal consistency test to determine whether a system of credits is valid. If a state treats two taxes as equivalent for local purposes through a credit mechanism - like sales and use taxes or manufacturing and selling taxes - it must treat those taxes as equivalent when paid to other states.

ANC separately challenges both the manufacturing tax and the selling tax. However, the petition tends to mush the two together. This makes the analysis needlessly complex. Accordingly, we will discuss the manufacturing

and selling taxes separately and demonstrate that there is no discrimination.

A. The Manufacturing Tax Does Not Discriminate, For All Manufacturers Are Subject to The Tax and Interstate Business Receives a Credit if it Pays Selling Tax Elsewhere.

The former multiple activities exemption at issue in Tyler Pipe excused manufacturing tax if selling tax was paid to Washington - but not if selling tax was paid to another state. As a result the manufacturing tax was imposed primarily on interstate rather than local business.

This problem was completely eliminated when the Washington Legislature repealed the multiple activities exemption. Now all Washington manufacturers are subject to manufacturing tax at the same rate and measure. If a Washington manufacturer produces goods worth $1,000 and sells them locally, its Washington manufacturing tax is $4.40 ($1,000 x .0044). A Washington manufacturer selling $1,000 of goods elsewhere is subject to exactly the same Washington manufacturing tax.

Washington does not tax the incident of manufacturing more heavily when it crosses state lines than when it occurs entirely within the State. ANC concedes that Washington's manufacturing tax is internally consistent. Pet. 9. If every state imposed Washington's manufacturing tax, there would be no impermissible interference with free trade. Thus, under the decisions of this Court including *Tyler Pipe* there is no discrimination.

ANC asserts that discrimination exists because local manufacturers, selling in Washington, may take a credit against Washington selling tax, but interstate manufacturers receive no such benefit. Pet. 14. This is not true. A Washington manufacturer selling elsewhere is entitled to a credit against its Washington manufacturing tax for selling tax paid to another jurisdiction. If a Washington man-

ufacturer is subject to selling tax of $4.40 on the sale of $1,000 of goods in Delaware, for example, it will pay absolutely no Washington tax on the transaction of manufacturing those goods. Again, local and interstate businesses are treated with an even hand.

B. The Selling Tax Does Not Discriminate, For Both Local and Interstate Businesses Can Take a Credit Against The Selling Tax.

ANC argues that the selling tax discriminates because a local business that pays Washington manufacturing tax receives a credit against Washington's selling tax. On the other hand, an interstate business manufacturing in a state without a manufacturing transaction tax is not entitled to a credit against Washington's selling tax. Pet. 13. ANC's argument is based solely on the fact that other sovereign states impose different kinds of taxes. ANC ignores the fact that an interstate business that pays manufacturing tax to another jurisdiction, such as Delaware, also receives a credit against Washington selling tax. The only difference turns on the tax decisions made by other states.

Furthermore, even when an interstate business pays Washington selling tax there is no discrimination, for a local business must pay manufacturing tax to obtain the credit. For example, a local business will pay manufacturing tax of $4.40 on the manufacture of goods worth $1,000 (.0044 x $1,000). An interstate business will pay $4.40 of selling tax - calculated on the same measure and rate - on the sale of $1,000 of goods in Washington. Thus, Washington does not tax an activity or incident more heavily when it crosses state lines.

The Court has already rejected ANC's reasoning in the context of retail sales and use taxes. A local business buying equipment in Washington is subject to retail sales tax. The business is automatically exempt from the Wash-

ington use tax imposed on the privilege of using property in this State. A business that purchases equipment in interstate commerce for use in Washington is subject to Washington use tax. There is no automatic exemption, but the business is entitled to a credit against the use tax if it pays retail sales or use tax to another jurisdiction. However, the credit is only allowed for the payment of retail sales or use tax. There is no credit for the payment of other types of taxes such as income or property taxes. Thus, to use ANC's example (Pet. 13), if a business buys equipment in Oregon (which has no sales and use tax), there is no credit and the business must pay a Washington use tax which local purchasers do not pay.

Although the interstate business pays a use tax not paid by local business this Court sustained Washington's use tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) because local business pays retail sales tax. There is no discrimination.

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.

Tyler Pipe, 483 U.S. at 246 n.14 (quoting *Silas Mason*, 300 U.S. at 584).

In *Tyler Pipe* Washington did not allow a credit for selling taxes paid to other states. As a result of this defect this Court did not find the use tax analogy persuasive. However, this Court clearly indicated that the analogy would be persuasive if Washington allowed credit for selling taxes paid to other states. The Court stated:

> [In *Silas Mason* we] upheld the [use] tax because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from use tax for goods on which a sales tax had already been paid,

> regardless of whether the sales tax had been paid to Washington or any other State.

483 U.S. at 245 (footnotes omitted). This Court immediately went on to indicate that a similar credit would cure the defect. The Court said:

> The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State.

483 U.S. at 246-47.

By extending a credit to interstate business Washington also solved another problem the Court found analytically troubling in *Tyler Pipe*. The former multiple activities exemption treated the manufacturing and selling taxes as equivalent for local business but did not treat them as equivalent for interstate business. This caused the Court to conclude that manufacturing and selling were not "substantially equivalent events such that taxing the manufacture of goods sold outside the State can be said to compensate for the State's inability to impose a wholesale tax on those goods." 483 U.S. at 243 (footnote omitted).

Now, however, Washington treats its selling and manufacturing taxes as equivalent for both local and interstate business, for the credit applies to manufacturing and selling taxes paid to any jurisdiction, not just Washington. This corrected the defect identified by this Court in *Tyler Pipe*.

IV. WASHINGTON DOES NOT CONDITION THE AVAILABILITY OF THE CREDIT ON RECIPROCITY FROM SISTER STATES.

ANC alleges that the credit violates *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) because Washington requires other states to conform their tax labels and calculations to Washington's. Pet. 17. ANC's argument continues to misconstrue the issue in this case. The question of which taxes qualify for credit is not before the Court. Properly stated, the question is whether the exclusion of different types of taxes, such as income or property taxes, violates *New Energy*. The answer to this question is no - for two reasons.

First, ANC misreads *New Energy*. The case concerned an Ohio law "providing Ohio gasohol dealers a credit of so many cents per gallon of ethanol used in their product against the Ohio motor vehicle fuel sales tax payable on both ethanol and gasoline." 486 U.S. at 272. The controversy centered around a requirement of reciprocity from other states. Ohio denied "the credit to ethanol coming from States that do not grant a tax credit, exemption or refund to ethanol from Ohio * * *." *Id.* The Court ruled that the reciprocity requirement was discriminatory. 486 U.S. at 274-75.

Washington's credit mechanism does not require reciprocity. If a manufacturing or selling tax is paid to another jurisdiction, Washington allows credit - even if the other jurisdiction does not grant credit for the payment of Washington taxes.

New Energy does not prohibit a state from allowing a credit for some taxes and not for other taxes. Again, the sales and use tax analogy is useful. The use tax approved in *D. H. Holmes*, 486 U.S. 24 (1988) only allowed credit for payment of "a similar tax". 486 U.S. at 31. There was no credit allowed for the payment of other types of taxes such as income or property taxes. However, there was no reciprocity requirement in *D. H. Holmes* and thus no violation

of *New Energy*. Reciprocity is the evil at which *New Energy* is directed. Washington's credit mechanism does not have a reciprocity requirement.

The second reason *New Energy* does not apply is that Washington's tax system does not place interstate products at a commercial disadvantage. To understand the commercial disadvantage in *New Energy* assume:

1. The motor vehicle fuel sales tax was 10 cents a gallon
2. The credit for ethanol was 02 cents a gallon.

Under these assumptions 100 gallons of motor fuel, containing 50 gallons of Ohio ethanol, was subject to a total Ohio tax of $9.00.

$10.00 .....100 gallons motor fuel x 10 cents motor vehicle fuel sales tax
– 1.00 .....50 gallons of ethanol x 02 cents credit per gallon
$ 9.00 .....motor vehicle fuel sales tax on 100 gallons of motor fuel containing 50 gallons of Ohio ethanol

If a state did not reciprocate, the Ohio credit was unavailable. The Ohio motor vehicle fuel sales tax on 100 gallons of motor fuel, containing 50 gallons of ethanol from such a state, was $10.00 (1,000 gallons x 10 cents). A commercial disadvantage existed because the Ohio tax on interstate commerce of $10.00 was greater than the Ohio tax on local commerce of $9.00.

The problem in *New Energy* does not exist in Washington. A local business manufacturing and selling $1,000 of goods in this state pays $4.40 in manufacturing B&O tax ($1,000 x .0044). The tax on an interstate transaction (either manufacturing or selling) in Washington is also $4.40 on $1,000 of goods. In addition, if another state imposes a manufacturing or selling tax, the Washington tax will be reduced correspondingly by the credit. Thus, if an interstate business pays $4.40 of selling tax to Delaware

on the sale of $1,000 of goods made in this State, the Washington manufacturing tax is zero. Unlike *New Energy*, Washington imposes an equal burden on interstate and local commerce.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

DATED this 27th day of July, 1990.

Respectfully submitted,

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No. 89-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Washington Supreme Court

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. Washington Seeks to Obscure the Continued Facial Discrimination in Its Tax by Injecting a False Issue of Internal Consistency.

Understandably, Washington asks the Court to turn a blind eye to the history of its tax. R. Br. 2-3. That history reveals persistent efforts to preserve discriminatory advantages for local business by changes in phraseology, but not practical effect, each time the tax has been invalidated for discrimination.[2] The problem facing

[1] A listing of the parent and subsidiary corporations of each corporate Petitioner accompanied the Petition.

[2] *See* Petition 2-9. Washington's record of manipulative wordsmithing without change in economic substance resembles that of Florida, as recited in a recent decision by the Court, *McKesson Corp. v. Florida Alcohol & Tobacco Division*, No. 88-192 (U.S. June 4, 1990).

Washington here is that the current version of its tax perpetuates the facial discrimination for which this Court condemned the prior version in *Tyler Pipe Industries v. Washington Department of Revenue*.[3] An Oregon manufacturer, who pays a tax for the privilege of manufacturing in that state, will also pay a selling tax for the privilege of selling in Washington that a Washington manufacturer will not pay. Petition 12-14. This is classic facial discrimination. To obscure that fact, the State's brief has repeatedly suggested that *Tyler Pipe* turned on "internal consistency." Two of the State's titles read: "Tyler Pipe Invalidated the Multiple Activities Exemption Because it Lacked Internal Consistency" and "The Internal Consistency Test Does Not Require a State to Give Credit for Other Types of Taxes."[4] R. Br. 3, 10. Petitioners have conceded that Washington's tax is internally consistent. The injection of that non-issue into the case is simply setting up a straw man and knocking it down to hide the continued facial discrimination.[5]

Convincing proof that *Tyler Pipe* struck down the prior version of Washington's tax *because it was facially discriminatory* can be found in Justice O'Connor's concurring opinion in that case, particularly when contrasted with her dissent in *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), decided the same day. Justice O'Connor explained that she joined the *Tyler Pipe* majority opinion " '[i]n light of the facially discriminatory nature of the multiple activities exemption,'. . . . " 483 U.S at 253 (quoting *Id.* at 244). Specifically, Justice O'Connor did "not read the Court's decision as extending the 'internal consistency test' described in *Armco, Inc. v. Hardesty*[6] to taxes that are not facially

[3]483 U.S. 232 (1987).

[4]Additional internal consistency arguments appear under other headings. R. Br. 14, 16-17.

[5]The State's tactic of confusing the internal consistency test with facial discrimination succeeded in confusing the court below. *See* Petition 11 n.7.

[6]467 U.S. 638 (1984).

discriminatory. . . ." *Id.* at 253 (citation omitted). By contrast, Justice O'Connor (joined by the Chief Justice and Justice Powell, author of the *Armco* decision), dissented in *Scheiner* because that case, unlike *Tyler Pipe*, turned on the internal consistency test.

The importance of the fact that facial discrimination was the basis for the invalidation of Washington's tax in *Tyler Pipe* stems from the persistence of facial discrimination in the current version of the tax. Washington's new credit is a tailored credit—tailored to be ineffective for interstate commerce—leaving the practical operation of the tax virtually unchanged. *See* Petition 6-7. Despite claiming that "the credit is working" (R. Br. 6-7), the State has not denied that the benefits received by local business have been 100 times more valuable than those received by interstate commerce.[7] *See* Petition 7-8, 16. Whether such a tailored credit can succeed is an important federal question. The integrity of this Court's decisions in both *Tyler Pipe* and *Armco* depend on how the issue is resolved.

2. In Claiming That the Petition Mischaracterizes the Issue, Washington Distorts Petitioners' Contention: That a Credit, Which Is Supposed to Equalize Burdens, Should Not Be Denied for Reasons Irrelevant to Equalization.

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[7]The State has limited its response to an incorrect claim that "Petitioners did not claim credits under the law," while denying that claiming the interstate credits is burdensome. R. Br. 2, 6 n.6. The State's regulation requires a tracing of ingredients or products from one jurisdiction to another: "other states' tax payments claimed for MATC [*i.e.*, the credit] must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific." Wash. Admin. Code § 458-20-19301(5)(c) (1988). While some petitioners claimed the new credit, others reported that the tracing burden, not shared by wholly local business for whom the credit is automatic, outweighs the tax benefit. Petitioners' Affidavit Nos. 122b, 122d, 122i-122j, 122m, 122q-r, 127. Similarly, while the State makes much of the enlargement of its list of eligible credits from the 27 mentioned in the State's initial list to a current 58, it may be noted that 31 of these are taxes of small towns in West Virginia and South Carolina, hardly significant trading partners of Washington.

The State's assertion that "[w]hat is before this Court is ANC's assertion that if Washington allows a credit for one kind of tax, it must allow a credit for every tax paid by an interstate business" (R. Br. 10) is patent nonsense. Similar distortions appear at the front of the State's brief under the heading "What this case is really about" and later where the State purports to restate the "gravamen" of Petitioners' challenge. R. Br. 1-2, 11. The relief sought by the Petition is much more focused than the State has acknowledged.[8]

Disparity of treatment, as condemned in *Tyler Pipe*, of taxpayers similarly situated (except for location in other states) remains the issue here. Taxes imposed by other states that are measured by the same business revenues that Washington includes in its measure—and that are imposed for performing the same types of activities (manufacturing and selling) that Washington taxes—are ineligible for the credit. The State correctly observes that there is no challenge to the practical application that it has given its amended tax, which appears compelled by legislative design. R. Br. 9-10. The resulting issue is purely a federal one—whether the disparity that occurs by design and in practical effect is unconstitutional discrimination where the disparity is based on peculiarities of tax phraseology and computations that are not relevant to equalizing burdens. *See* Petition 13-22.

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[8]Contrary to the State's assertion, Petitioners make no claim of credit for consumer (sales/use) or property taxes—only taxes resulting from performing the business activities of manufacturing and selling. A similar distinction was made in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989), between taxes on consumers, recognized by the majority as political insiders better able to protect themselves from tax discrimination, and taxes on interstate businesses, which are political outsiders vulnerable to discriminatory attempts to favor local business. *See* Petition 20-21 n.19. Note also that the relief in this case will be in accord with this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Division*, No. 88-192, decided June 4, 1990, rather than "a refund of all of the manufacturing and selling taxes [Petitioners have] . . . paid," as the State asserts. R. Br. 8-9.

Another distortion in Washington's brief is the State's claim that Petitioners' argument is "contrary to the principle that the validity of one state's tax system does not depend on the tax laws of other states." R. Br. 13-14. *Just the opposite is true.* It is the State which has focused on other states' taxes by making some eligible and many ineligible for the credit. Petitioners deny that the focus of such a credit should be on perfect conformity in the taxable incidents and details of calculation. Instead, Petitioners' contention looks to economic effect, inquiring whether other taxes include the same revenues in their measure as Washington does, and whether the other taxes result from performance of the same activities that form the basis for Washington's tax.

3. Washington's Attempted Distinction of *New Energy* as Limited to Forced Reciprocity Ignores the Underpinnings of That Decision.

The State's brief asserts that "Reciprocity is the evil at which *New Energy*[9] is directed" (R. Br. 22) and follows with the observation that "Washington's credit mechanism does not have a reciprocity requirement." R. Br. 22. But the *New Energy* rule against discrimination is broader than that. It condemns other forms of favoritism toward local business as well as forced reciprocity. *New Energy* placed reliance on *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 349-351 (1977), in which the Court "found invalid under the Commerce Clause a North Carolina statute that did not exclude apples from other States, but merely imposed additional costs upon Washington sellers and deprived them of the commercial advantage of their distinctive grading system." 486 U.S. at 275. No reciprocity was involved. Similarly, *New Energy* relied upon *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), in which the Court struck down a New York law requiring that the initial purchase of milk imported into the State be made at or above the New York State-mandated price. 486 U.S. at 275.

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[9] *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

4. Washington's Claim That Its Disparity of Treatment Meets the *New Energy* Standard of Justification Because the Taxes Ineligible for Its Credit are "Fundamentally Different" Presents an Issue That Is Itself an Important Federal Question.

The Oregon manufacturer who pays Oregon's "privilege" tax for manufacturing in Oregon will also pay a "privilege" tax for selling in Washington that a Washington manufacturer will not pay. Washington justifies this denial of equal treatment on the ground that the Oregon tax is "fundamentally different," even though both taxes are imposed on the "privilege" of doing business and include the same revenues in their measures.[10] That is because deductions allowed in determining the Oregon tax base would cause Oregon's tax to be labeled an "income tax" under Washington law even though the Oregon Supreme Court has held that Oregon's tax is not an income tax. *See* Petition 13. This paradox is justified by Washington because Oregon narrows its tax base by deductions before multiplying the base by a tax rate of 6.6% to arrive at the tax, whereas Washington calculates its tax with a broader base, allowing only a few deductions (for bad debts, transportation expenses, etc.), multiplied by a much lower tax rate of roughly .5%. These details of tax calculation ought to be within the province of each state. Washington's credit, however, makes them crucial to parity of tax

[10]Washington's brief repeatedly characterizes its taxes as "transaction taxes," as if that term were an accepted part of tax lexicon. R. Br. i, 1-5, 7-9, 11-13. But the State has cited no authority suggesting that the phrase is a term of art or descriptive of any particular kind of tax. Indeed, as Washington uses "transaction" in the phrase "transaction of *manufacturing*" it necessarily has a broad and amorphous meaning going well beyond the usual and ordinary sense of the word, which is the act of "carry[ing] on or conduct[ing] (business, negotiations, activities, etc.) to a conclusion or settlement." Random House Dictionary of the English Language (2d ed. 1987). R. Br. 5, 12-13. In short, the "transaction" characterization is as arbitrary as Washington's claim that its taxes are "fundamentally different" from other taxes that are measured by the same revenues and imposed as a result of performing the same types of manufacturing and selling activities.

treatment.[11] An important federal question is presented where the producers and sellers from other states can have parity of tax treatment with local taxpayers in Washington only on condition that the required level of conformity is met.[12]

5. Conclusion: An Important Federal Question Is Presented.

As Washington correctly observes, this Court has invited the use of credits. R. Br. 4-5. In accepting that invitation, Washington devised a credit narrowly tailored to perpetuate the practical effect of the previously condemned tax. Not even Washington has denied the importance of determining whether such a credit, having minimal practical effect, is consistent with the Court's holdings in *Armco* and *Tyler Pipe* and with the principles laid down in the leading case of *Complete Auto Transit.*[13] Given the ease with which states can achieve or maintain local favoritism with credits fashioned like Washington's, the issue of whether Washington has met the "high" burden of justification for disparate treatment

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[11]The State's citing of practical difficulties in computing credits for taxes allowing more deductions than Washington allows (R. Br. 12 n.20) is specious considering the additional burdens already imposed on interstate commerce by Washington's "product specific" credit requiring tracing of ingredients and products from place to place. Wash. Admin. Code § 458-20-19301(5)(c). Only local business gets an automatic credit.

[12]The State argues that the petition is "inaccurate" because Washington has approved taxes that have a different *name* than Washington's tax. R. Br. 7. But the Petition makes clear that the vice is not control over the tax *name*, but rather forced conformity in taxable "incidents" and details of calculation. Petition 19-20. The Indiana and Kansas City, Missouri taxes mentioned by the State as examples of eligible taxes have incidents and methods of calculation that conform precisely to Washington's system.

[13]430 U.S. 274 (1977).

See Brief of the Committee on State Taxation of the Council of State Chambers of Commerce as Amicus Curiae in Support of Petitioners for a discussion of the relevancy of *Complete Auto Transit* principles.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

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v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as amicus curiae in support of the petitioners' petition for writ of certiorari in the above-captioned case. The consents of the counsel for petitioners and respondent have been obtained and will be filed with this Court.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), one of three advisory committees of the Council, consists of 344 corporate members, including thirty-seven of the seventy-seven petitioners.

COST's objective is to preserve and promote equitable and non-discriminatory state taxation of corporations engaged in business enterprises in more than one state. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers. They are representative of that part of the Nation's business sector which is directly affected by state taxation of interstate operations. Therefore, COST is vitally interested in cases such as the instant case in which a discriminatory tax scheme places interstate corporate taxpayers at a competitive disadvantage solely because of their status as interstate, rather than intrastate, corporations.

SUMMARY OF ARGUMENT

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court made clear that whether a state tax will meet Commerce Clause requirements does not depend on formalisms, but on the practical economic effect of the tax on interstate commerce. This Court rejected the contention that constitutional significance should attach to semantic differences. *Id.* at 285. However, the State of Washington has attempted to revert to pre-*Complete Auto* law, under which state taxes were upheld if sophisticatedly drafted to appear to formally conform with the Commerce Clause.

This Court invalidated Washington's previous business and occupation tax in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) because the multiple activities exemption then in effect discriminated against interstate commerce. The tax scheme at issue in *Tyler Pipe* imposed a "selling" tax on both local and out-of-state manufacturers. However, local manufacturers were exempt from the State's "manufacturing" tax. Out-of-state manufacturers were not allowed that exemption.

At issue in this case is the business and occupation tax scheme enacted in response to *Tyler Pipe*. The drafters of this tax scheme repealed the multiple activities exemp-

tion struck down in *Tyler Pipe* and replaced it with a credit system. Under this system, local manufacturers are allowed a credit against their selling tax for their manufacturing tax paid to the State. Technically, the statute allows out-of-state manufacturers a credit against the Washington selling tax for the manufacturing tax paid to other states. However, the definition of a manufacturing tax has been so narrowly defined to effectively deny the credit to out-of-state manufacturers. Thus, through creative draftsmanship, local businesses continue to receive an exemption denied out-of-state businesses.

The fact pattern in this case is very similar to that in *McKesson Corporation v. Florida Alcohol and Tobacco Division*, —— U.S. —— (1990), involving the Florida tax scheme enacted in response to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held that a tax scheme virtually identical to Florida's was unconstitutional. Florida's revised tax scheme was found unconstitutional as it "reflected only cosmetic changes from the prior version of the tax scheme . . . invalidated in *Bacchus*", *McKesson, supra*, Slip Op. at 25, so that the practical economic effect of the revised tax, as in the case of the original tax scheme, was to favor local business over out-of-state business.

The practical economic effect of Washington's revised tax is that it favors local business over out-of-state business. Thus, under this Court's post-*Complete Auto* Commerce Clause analysis, the current tax scheme is no different from the tax struck down in *Tyler Pipe* and must also be held invalid. If the decision of the Washington Supreme Court is allowed to stand, the States will be encouraged to avoid Commerce Clause restrictions on their taxing power through clever use of legal terminology. In *McKesson*, the use of creative draftsmanship as a means of circumventing the Commerce Clause was rejected and its use must again be rejected in the instant case.

ARGUMENT

THE COMMERCE CLAUSE PROTECTIONS ARE INVOKED WHEN THE PRACTICAL EFFECT OF A STATE TAX RESULTS IN DISCRIMINATION

It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and that its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce be free from any direct restrictions or impositions by the States. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Thus, while States may tax interstate commerce, they are prevented from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *Id.* The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). These are long acknowledged Commerce Clause principles. However, the application of these principles by this Court has developed from one based on formalisms to one based on practical economic effect. When the practical economic effect of Washington's Business and Occupation (B&O) Tax is examined, it is clear that the tax violates these principles.

In the 19th century, this Court established the doctrine that the Commerce Clause limits state power over interstate commerce, holding that "no state can impose a tax upon freight transported from state to state." *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 281, 282 (1873). Contemporaneously, the Court permitted a tax on the gross receipts of a railroad company, but acknowledged that the line between a tax on the transportation and a tax on the income from the transportation is one that "is sometimes difficult to define with distinctness."

State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284, 296 (1873). Thus, in these two cases, two taxes that have a substantially similar impact on interstate commerce are accorded different constitutional treatment because of a fine line distinction between a "direct" and "indirect" tax. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 ABA Tax Lawyer 37 (1987).

For the next century, states, taxpayers and this Court struggled with this formalistic approach. This Court itself acknowledged that after some 300 decisions decided in the course of a century it had created a "quagmire" and that there was a need for clearing up "the tangled underbrush of past cases." *Northwestern States Portland Cement*, at 485. However, in *Northwestern*, this Court upheld a tax which was virtually identical in every respect to a tax it had invalidated in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), because "the formal subject of the tax in *Northwestern* was the corporation's net income, whereas in *Spector* it was the privilege of doing business." Hellerstein, *supra*, at 55. Thus, the rule of formalism continued. This is made eminently clear in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), in which the Louisiana franchise tax, previously held unconstitutional by a State court, was upheld because the statute no longer imposed the tax on "the privilege of carrying on or doing business", but imposed it on "the qualification on or do business in this state . . . in the corporate form."

Under the above cases, it was apparent that "with a minimum of wordsmithing, the legislature was able to deprive the taxpayer of its constitutional immunity." Hellerstein, *supra*, at 55. However, in 1977 this Court squarely faced the problems it had created with its formalistic reliance on wordsmithing in state tax statutes in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). This Court recognized that "the Spector rule, as

it has come to be known, has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman." *Complete Auto Transit*, at 279. Thus, this Court explicitly rejected the Spector rule since it "deems irrelevant any consideration of the practical effect of the tax", *id.* at 278, and "there is no economic consequence that follows necessarily from the use of the particular words . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288.

In overruling *Spector*, this Court observed that the retention of the formalistic view had the effect of "narrowing the rule to one of draftsmanship and phraseology." *Id.* at 281. This Court then enunciated the four requirements which now constitute the Commerce Clause test for state taxes: 1) the tax must have a substantial nexus with the state; 2) the tax must be fairly apportioned to the activities carried on by the taxpayer in the state; 3) the tax must be nondiscriminatory; and 4) the tax must be fairly related to the services provided by the state. Under this four part test, which has consistently been applied by this Court, the validity of a tax depends on its practical economic effect.[1]

When the practical economic effect of the current Washington B&O tax credit scheme is examined, it is clear that the tax differs from that in *Tyler Pipe* only in "draftsmanship and phraseology". As in *Tyler Pipe*, this tax scheme must be found to violate the Commerce

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[1] State taxes were found to violate the third, nondiscrimination requirement in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Tyler Pipe Indus. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *New Energy Co. v. Limbach*, 108 S.Ct. 1803 (1988).

Clause.[2] Therefore, it is important that this Court accept this case for review in order that the States clearly understand that the Commerce Clause cannot be circumvented through the use of draftsmanship and phraseology and that this Court has not retreated from its landmark decision in *Complete Auto.*

CONCLUSION

For the foregoing reasons, the Committee on State Taxation respectfully requests that the Petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[2] Petitioners have demonstrated that the practical economic effect of the current credit scheme is no different than that struck down in *Tyler Pipe.* Insofar as that argument has been fully developed in Petitioners' Petition for Writ of Certiorari, COST will not present any argument on this issue. However, COST is in full accord with the argument as presented by Petitioners.

as required by *New Energy* presents an important federal question. For the foregoing reasons, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

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